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CORPORATE MERGERS AND PRICE DISCRIMINATION

JULY 27, 1956.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 9424]

The Committee on the Judiciary, to which was referred the bill (H. R. 9424) to amend the Clayton Act, as amended, by requiring prior notification of corporate mergers, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

AMENDMENT IN THE NATURE OF A SUBSTITUTE

Strike all after the enacting clause and insert in lieu thereof the following:

That section 7 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 731, as amended; 15 U. S. C. 18) is amended—

(a) by striking out the fifth paragraph thereof; and

(b) by striking out the first, second, and third paragraphs thereof, and inserting in lieu thereof the following:

"SEC. 7. No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of, and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire, directly or indirectly, the whole or any part of the assets of one or more corporations, where either the acquiring corporation or the corporation in which stock or assets are acquired is engaged in commerce, and where in any line of commerce in any section of the country the effect of such acquisition of such stock or assets, or the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly. This paragraph shall not apply to corporations purchasing stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"No corporation subject to the provisions of this Act shall acquire, directly or indirectly, the whole or any part of the stock, other share capital or assets of one or more corporations, where either the acquiring corporation or the corporation in which stock or assets are acquired, is engaged in commerce, where the combined capital, surplus, and undivided profits of the acquiring and the acquired corporations are in excess of $10,000,000 until the expiration of a waiting period of twenty days after delivery to the Commission or Board vested with jurisdiction under the first paragraph of section 11 of this Act and to the Attorney General of notice of the proposed acquisitions: *Provided, however*, That the Commission or Board or Attorney General, before the expiration of such period, may at the exercise of its or his sole discretion, extend such waiting period to a period not exceeding 90 days by personal service of notice or the sending of confirmed telegraphic notice of such extension. The notice required to be delivered to the Commission or Board and the Attorney General shall set forth the names and addresses, nature of business, products or services sold or distributed. total assets, net sales, and trading areas of the acquiring corporation and the corporation in which stock or assets are acquired. The parties shall furnish within thirty days after request therefor, such additional relevant information within their knowledge or control as may be requested within ninety days after delivery of notice of the proposed acquisition by the Commission or Board vested with jurisdiction under section 11 of this Act or by the Attorney General, provided that the Commission or Board or Attorney General may, in its or his sole discretion, extend the time for furnishing such additional relevant information. Any corporation willfully failing to give the notice or to furnish the required information shall be subject to a penalty of not less than $5,000 or more than $50,000, which may be recovered in a civil action brought by the Attorney General. Any officer or employee of the Commission or Board or Department of Justice who shall make public any information furnished to the Commission or Board or Attorney General pursuant to the provisions of this paragraph, without the authority of the Commission or Board or Attorney General, unless directed by a Court, or unless such information has already been made public, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the Court. Failure by the Federal Trade Commission, the Attorney General or other appropriate agency to request additional relevant information pursuant to this paragraph or to interpose objection to such acquisition within the ninety-day period shall not bar the institution at any time of any investigation by means other than those authorized by this paragraph or any action or proceeding with respect to such acquisition under any provision of law. The Commission or Board vested with jurisdiction under section 11 of this Act, after consultation with and upon approval of the Attorney General, shall, within one hundred and twenty days after the enactment of this law, establish procedures for the waiver by the appropriate Commission or Board and the Attorney General of all or part of the notification and waiting requirements in appropriate cases or categories of cases. This paragraph shall not apply to any acquisition by a corporation of additional shares of stock of any other corporation where it may have held or controlled on the date of enactment of this amendment, directly or indirectly, more than 50 per centum of the voting rights, as represented by voting stock or other voting share capital, of such other corporation whose stock is being acquired; or to any acquisition of stock when the stock acquired or held does not exceed 15 per centum of the voting rights, as represented by the voting stock or other voting share capital, of the corporation in which the stock is acquired; or to any acquisition of stock, in a single transaction or series of related transactions unless the fair market value of the consideration paid for such stock in such transaction or transactions exceeds one million dollars; or to any acquisition, in a single transaction or series of related transactions, by one corporation of assets of any other corporation if the fair market value of the consideration paid for such assets in such transaction or transactions (after deducting that portion thereof comprising stock in trade used in the ordinary course of the transferring corporation's business, and transferred by such acquisition) exceeds $1,000,000; or to any acquisition of stock or assets which, under any specific provision of law, requires the approval in advance of a Commission or Board or other agency of the United States, and when so approved is exempt from the provisions of this section. Any Commission, Board or agency of the United States which is authorized by law to approve the acquisition by one corporation of the stock or assets of another corporation where by virtue of such approval such acquisition is exempted from the provisions of this section shall promptly notify the Attorney General of any application or request for such approval. The pro-

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visions of this paragraph shall take effect one hundred and twenty days after their enactment.

"The several district courts of the United States are invested with jurisdiction to adjudicate the legality of any proposed or consummated acquisition with respect to which the Attorney General or his authorized representatives or the Federal Trade Commission by any authorized representative has threatened suit, or which any of them has otherwise officially asserted to be illegal under this Act. Any corporation which is a party to such controversy may bring suit against the United States to obtain a declaration of its rights with respect to such acquisition and to have the legality of such adquisition finally adjudicated, whether or not further relief is or could be sought, and during the pendency of such suit the proposed acquisition shall not be consummated. Any such suit may be brought in the District of Columbia or in any district in which the acquiring or acquired corporation resides or transacts business. Service of process in any such suit shall be effected in accordance with the Rules of Civil Procedure for District Court of the United States. It shall be the duty of the Attorney General to defend any such suit, which shall be speedily determined by the district court having jurisdiction thereof. Whenever it shall appear to the court before which any such suit may be pending that the ends of justice require that other persons should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpenas to that end may be served in any district by the marshal thereof. Any such declaration or adjudication shall have the force and effect of a final adjudication or decree and shall be reviewable as such.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorized or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided."

SEC. 2. Section 15 of such Act (15 U. S. C. 25) is amended by inserting after the first paragraph thereof the following new paragraph:

"Whenever the Federal Trade Commission has reason to believe—

"(1) that any corporation subject to its jurisdiction is acquiring or has acquired stock or assets of another corporation in violation of the provisions of section 7 of this Act; and

"(2) that the enjoining of such acquisition or the maintenance of the status quo after acquisition pending the issuance of a complaint or the completion of proceedings pursuant to a complaint by the Commission under this section and until such complaint is dismissed by the Commission or set aside by the court on review, would be to the interest of the public,

the Commission, by any of its attorneys designated by it for such purpose, may bring suit in a district court of the United States to prevent and restrain violation of section 7 of this Act or to require maintenance of the status quo. Any such suit may be brought in any district in which the acquiring or the acquired corporation resides or transacts business. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited, and the court may make such temporary restraining order or prohibition as shall be deemed just in the premises. In any case where injunction or restraining order is granted under this paragraph, the Federal Trade Commission shall proceed as soon as may be to the issuance of the complaint and to the hearing and determination of the case."

SEC. 3. Subsection (b) of section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (15 U. S. C. 13 (b)), is hereby amended to read as follows:

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor: *Provided further*, That nothing contained herein shall be construed to alter the law applicable to the absorption of freight or of shipping charges."

SEC. 4. Subsection (c) of section 18 of the Federal Deposit Insurance Act is amended by striking out the third sentence thereof and substituting in lieu thereof the following: "No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a district bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a district bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a district bank). In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the factors enumerated in section 6 of this Act. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration whether the effect thereof may be to lessen competition unduly or to tend unduly to create a monopoly, and shall promptly notify each of the other two banking agencies referred to herein and the Attorney General of any application or request for such consent, and shall not take action as to any such transaction without first providing an adequate opportunity for an expression of views by such other agencies and an opinion by the Attorney General with respect to such effect."

Amend the title so as to read:

An Act to amend the Clayton Act, as amended, by requiring prior notification of corporate mergers, and for other purposes.

PURPOSE

The purpose of the proposed legislation, as amended, is to broaden the scope and strengthen the effectiveness of the law relating to corporate mergers and acquisitions; to strengthen the law relating to price discrimination; to extend the jurisdiction of Federal banking agencies over bank mergers and add a standard of competition to the legal tests applicable to such transactions.

ANALYSIS OF SECTIONS 1 AND 2

STATEMENT OF PROVISIONS

H. R. 9424 makes a number of changes in sections 7 and 15 of the Clayton Act. These changes are both substantive and procedural in character.

Either corporation engaged in commerce.—The first section of the bill amends section 7 to make it applicable to transactions where either the acquiring corporation or the corporation from which stock or assets are acquired is engaged in interstate or foreign commerce, as contrasted with the present law which can be applied only where the corporation from which stock or assets are acquired is engaged in such commerce.

Advance notice.—Section 7 is further amended by the addition of certain procedural provisions under which companies proposing to merge must give the Government advance notice of such intention and wait for a certain period of time before consummating the transaction, thus providing the enforcement agencies with the timely opportunity of proceeding against mergers of doubtful legality. Any corporation subject to the provisions of the Clayton Act and proposing to acquire stock or assets of a corporation, where either corporation is engaged in interstate or foreign commerce, is required to give the appropriate enforcement agencies advance notice of the proposed

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acquisition and to wait for a period of from 20 to 90 days before consummating the transaction. Such a corporation must, as part of the notice, furnish information concerning the names and addresses, nature of business, products or services sold or distributed, total assets, net sales and trading areas of the acquiring corporation and the corporation in which stock or assets are acquired. The acquiring corporation must also furnish such additional relevant information as may be requested within the 90-day period by the enforcement agencies. Civil penalties are provided for willful failure to furnish the required notice or information, and it is explicitly declared that failure by the enforcement agencies to request information or to object to the proposed acquisition within the 90-day period is not to bar any subsequent investigation, action or proceeding authorized by law.

The bill also provides that any information furnished to the Government agencies pursuant to the notice and information requirements shall not be made public by any officer or employee of the agency involved, without proper administrative authority, unless directed by a court or unless the information has already been made public. Violation of this nondisclosure provision becomes a misdemeanor.

The bill specifically exempts from the notice and waiting period provisions certain acquisitions based upon the size of the corporations involved, the size of the transaction, or the size of the proportionate stock interest acquired by one corporation in another. These exemptions cover any acquisition of stock or assets where the combined net worth of the corporations which are party to the transaction is $10 million or less; or any acquisition of stock, or of assets other than ordinary stock in trade, where the fair market value of the consideration paid is $1 million or less; or any acquisition of stock where immediately following the acquisition the acquiring corporation holds 15 percent or less of the voting rights of the corporation in which the stock is acquired, or where as of the date of enactment of this bill the acquiring corporation already holds more than 50 percent of the voting rights of the corporation in which additional stock is being acquired.

The bill also specifically exempts any acquisition where a regulatory agency is required to approve the transaction before it can become lawful and where such approval automatically exempts the transaction from section 7. The bill, however, places upon such regulatory agencies the obligation to notify the Attorney General of any application or request for such approval.

Aside from these statutory exemptions, the enforcement agencies are empowered to waive all or part of the notice and waiting period requirements pursuant to procedures which are to be established within 120 days of enactment, at the end of which time the provisions relating to advance notice are to take effect.

Declaratory judgment.—The bill provides that a corporation may file suit for a declaratory judgment in the Federal courts concerning a proposed or consummated acquisition where the Federal Trade Commission or Attorney General has threatened suit or officially asserted the transaction to be illegal under the Clayton Act.

Existing rights.—The bill provides that the amendments to section 7 shall not affect or impair any legal right in existence at the time of their enactment.

Injunctive powers.—The second section of the bill amends section 15 of the Clayton Act by vesting in the Federal Trade Commission power similar to that now enjoyed by the Attorney General to seek a court

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injunction to restrain proposed mergers before their consummation, or to maintain the status quo. It authorizes the Federal Trade Commission to petition a Federal district court for an order to enjoin stock and asset acquisitions which violate section 7, in advance of consummation, whenever it would be in the public interest. The Commission is also authorized by this bill to seek an injunction maintaining the status quo after the acquisition had been wholly or partially consummated. Such restraining orders could be sought either before the issuance of a complaint by the Commission, or before the completion of proceedings pursuant to a complaint, and may continue in effect until final disposition of the matter.

DIFFERENCES FROM HOUSE BILL

1. The provision concerning the applicability of section 7 to acquisition where either corporation is engaged in interstate or foreign commerce is an addition to the House bill.

2. The provision for advance notice is modified somewhat from a similar provision contained in the House bill:

(*a*) In place of the waiting period of 90 days there is substituted a more flexible provision under which the waiting period is limited in the first instance to 20 days, with any of the appropriate enforcement agencies having the power within that time to extend the period up to a maximum of 90 days. Such extension is to be entirely within the discretion of the agencies concerned.

(*b*) The additional relevant information which acquiring corporations must submit is limited to information which is within their knowledge or control and which is requested by the enforcement agencies within the 90-day period. The 30-day time limit established in the House bill for furnishing this information is modified by permitting any of the enforcement agencies to extend this period.

(*c*) The civil penalty of $5,000 to $50,000 for wilful failure to submit the required notice or requested information remains unchanged.

(*d*) This measure adds a provision to the House bill making it a misdemeanor to disclose improperly information which is required to be furnished.

(*e*) The right reserved to the enforcement agencies to institute any legal action or proceeding at any time despite failure to act within the 90-day period is broadened by including also the right to institute any investigation.

(*f*) The exemption in the House bill from the notice and waiting period requirements for acquisition of stock or assets where the combined net worth of the corporations involved does not exceed $10 million is retained in this measure.

(*g*) The exemption in the House bill for acquisition of stock as a result of which a corporation holds no more than 5 percent of the outstanding stock of another corporation is changed by raising this level to 15 percent, by applying this percentage to voting stock instead of to stock generally, and by eliminating the condition that the stock be acquired solely for investment. In addition, a further exemption for acquisitions of stock is provided where the fair market value of the consideration paid for such stock does not exceed $1 million, or where the stock acquired is of a corporation in which the acquiring corporation, as of the date this bill becomes law, holds or controls a majority voting stock interest.

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(*h*) The exemption for acquisitions of assets representing stock in trade or sold or held for sale by the corporation in the ordinary course of its business is retained in this measure. The further exemption provided in the House bill for asset acquisitions, other than ordinary stock in trade, which do not exceed the lesser of $5 million or 5 percent of the net worth of either corporation is changed to a flat exemption of $1 million or less for such asset acquisitions, as measured by the fair market value of the consideration paid.

(*i*) There is added to the exemptions provided in the House bill a further exemption for any transaction which requires the advance approval of a Government agency wherever such approval exempts the transaction from the provisions of section 7. To assure that the Attorney General is adequately informed of such transactions, however, provision is further made for notification to the Attorney General by the appropriate regulatory agency of the proposed transaction.

(*j*) The permissive authority given in the House bill to the appropriate commissions or boards, after consultation with and upon approval of the Attorney General, to establish procedures for waiving all or part of the waiting requirements in appropriate cases is changed by making the establishment of such procedures mandatory, by authorizing the waiver of notification as well as waiting requirements, by permitting such waivers to be granted by the Attorney General as well as by the other agencies, making it clear that waivers may be granted on a blanket basis for categories of cases as well as on an ad hoc basis. Another change is that the waiver procedures must be established within 120 days after enactment of this measure.

(*k*) The advance notice requirements are to take effect 120 days after enactment instead of at the time of enactment as under the House bill.

3. The House bill has been amended by a new provision for suit by a corporation seeking an adjudication of the legality of a proposed or consummated acquisition.

4. This measure contains a provision, not in the House bill, under which any rights legally acquired prior to enactment of these amendments to section 7 are not to be affected or impaired by the new provisions.

5. The provision in the House bill that—

> upon proper showing, a temporary injunction or restraining order shall be granted without bond—

is changed by substituting therefor a provision that—

> such proceedings may be by way of petition setting forth the case and praying the violation be enjoined or otherwise prohibited, and the court may make such temporary restraining order or prohibition as shall be deemed just in the premises.

EXPLANATION

Either corporation in commerce.—As defined in the Clayton Act, "commerce" means the interstate or foreign commerce of the United States. Section 7 at present has no applicability to stock or asset acquisitions where the corporation whose stock or assets are acquired is not engaged in such commerce. Thus the prohibitions of section 7

concerning corporate mergers or acquisitions which do substantial injury to competition does not apply where the acquired corporation is engaged in purely intrastate business. Testimony presented to the committee indicates that this exemption from the terms of section 7 should be eliminated so as to permit the enforcement agencies to reach situations where certain types of interstate corporations expand their power through a continuous pattern of acquisitions of purely intrastate businesses. Such acquisitions, while individually not of particular significance, can be of the greatest competitive significance from a cumulative standpoint.

Furthermore, it is sometimes unclear whether a corporation doing a local business is engaged purely in intrastate commerce or is, in a strictly legal sense, engaged in interstate commerce. The committee recognizes that the objective of section 7 is to prevent competitive evils which may be achieved by buying up other companies, and that these evils are the same whether the businesses acquired are interstate or intrastate in character.

Advance notice.—The notice and waiting period provisions of the bill are designed as an aid to effective enforcement of section 7 by assuring that the enforcement agencies will be adequately informed of proposed mergers so as to enable these agencies, if they see fit, to obtain court action to restrain the consummation of such transactions before the merging businesses are irrevocably mingled.

Both the Department of Justice and the Federal Trade Commission testified as to the necessity for such provisions. Present procedures by which these agencies attempt to keep informed of proposed mergers by culling information from newspapers and trade and financial publications are regarded as an inadequate and incomplete substitute for obtaining such information directly from the companies involved. Not only will the notice and information requirements of the bill insure the availability to the enforcement agencies of more reliable information than at present, but these requirements will also provide the agencies with information not otherwise available concerning mergers which are not publicly announced prior to their consummation.

An enforced waiting period following notice of intention to merge is also provided for the purpose of permitting the agencies to examine the initial information, to request additional relevant data, and to determine whether any action prior to the consummation of the transaction is justified. In the interest of minimizing the burdens of the waiting period requirements upon the business community, and in recognition of the fact that even with the establishment of liberal waiver procedures certain transactions with little or no competitive significance may technically be subject to these provisions, the bill limits the waiting period to 20 days unless in the discretion of the enforcement agencies additional time is needed. In such event, the period may be extended to a maximum of 90 days. While such discretion is vested in the agencies in order to make sure that they will have the benefit of the full period wherever it is needed for effective enforcement, it is not intended that this power will be exercised capriciously or arbitrarily. Whenever in its discretion the agency determines that such additional time is needed, it must officially notify the acquiring corporation to this effect before the end of the 20-day period, either by personal service of such notice or the sending of telegraphic notice.

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A burden is thus placed upon the enforcement agencies to examine promptly the notices files with them by companies proposing to merge and to determine promptly whether the facts are such as to require any further waiting period beyond the initial 20 days. At the same time it is the intention, as explicitly stated in the bill, that the enforcement agencies shall have the sole discretion in determining whether or not extension of the waiting period is necessary, and it is further intended that such discretion may be exercised without the necessity of hearings, proceedings or argument of any kind. The same intention applies to the discretion granted to the enforcement agencies to extend the period for the furnishing of additional relevant information which they are empowered to obtain.

An important feature of the bill is the declaration that failure of any of the enforcement agencies to request information or to interpose objection to a proposed merger during the 90-day period shall not constitute a bar to any subsequent action, proceeding, or investigation concerning the transaction in question. The reason for this provision is to make it clear that neither silence nor inaction by the enforcement agencies during the 90-day period is to be interpreted in any sense as constituting approval of the legality of the merger; nor does the bill in any sense confer authority upon the enforcement agencies to give legal approval to any proposed merger, either within or subsequent to the 90-day period.

Considerable testimony was presented in the hearings to the effect that many of the corporate transactions affected by this bill could be jeopardized by premature disclosure, and suggesting the need for safeguarding from unauthorized disclosure by Government personnel privileged company information required to be furnished. This bill makes it a misdemeanor for employees of the agencies receiving the information to make public this information without the authority of the appropriate Commission or Board or Attorney General. This prohibition against unauthorized disclosure does not apply where the information furnished has already been made public in one form or another, or where a court directs the publishing of such information. It is not the purpose of this section of the bill to restrict in any way the use of this information in a court proceeding, or in any other manner necessary for the enforcement of the statute. Accordingly, the bill does not prohibit making public the information where this is done under the specific authority of the Commission or Board or Attorney General. This provision does not prohibit making such information available to committees of the Congress.

In its hearings the committee received from a number of witnesses persuasive testimony indicating that exemptions from the notice and waiting period requirements of the bill were both necessary and desirable in the case of many transactions which, while technically acquisitions by one corporation of the stock or assets of another corporation, were actually remote from the type of transaction to which section 7 is intended to apply, or too small to justify the imposition of the burden of these requirements upon the business enterprises involved.

The following situation were among those cited as examples of such transactions:

1. Multitudinous types of intrafamily corporate transactions, such as stock acquisitions in the formation of a subsidiary corporation not previously in existence; acquisitions which increase a stock interest

in an already controlled corporation; transactions of a corporation with a controlled subsidiary, or of one corporation with another where both are controlled by a third corporation.

2. Stock acquisitions by an underwriting company in the ordinary course of its business of purchasing securities from an issuer for resale, or by a securities broker or dealer in the ordinary course of its business as such.

3. Acquisition of stock or assets where title is acquired solely as collateral for security purposes.

4. Stock acquisitions resulting from reorganizations which do not directly or indirectly increase the share of voting rights previously held in another corporation.

5. Stock acquisitions pursuant to the exercise of preemptive or similar rights.

6. Stock acquisitions pursuant to a mere change in identity, form, or place of organization.

7. Acquisitions of the stock or assets of foreign corporations which do not significantly affect commerce within the United States.

8. Sales of assets by a corporation constituting all or part of its ordinary inventory as stock in trade.

9. Sales of accounts receivable to factoring or other organization.

10. Sales of obsolete facilities or of buildings constructed or equipment manufactured to the specifications of a buyer.

11. Basket sales of mortgages by a mortgage company.

12. Sales and lease-backs of real property or capital equipment.

13. Acquisitions from United States Goverment corporations.

14. Acquisitions of bonds or other obligations of any Federal, State, or municipality or any of its instrumentalities previously held as assets of other corporations.

15. Ordinary steps by financial institutions in connection with borrowing transactions, such as foreclosure of a mortgage.

16. Acquisitions of timberlands or oil or other mineral properties, which are not in commercial production, and acquisitions of certain types of interests in such properties through production payments and similar arrangements.

17. Acquisition of stock or assets by corporations subject to jurisdiction of Federal regulatory agencies, where the prior approval of such agencies is already required by law.

The committee is convinced that in the interest of minimizing regulatory requirements imposed upon business, particularly small business, with respect to transactions bearing little or no significance under section 7, a strong justification exists for exemption from the notice and waiting period provisions for many of the types of transactions which have been called to its attention. Because of the large number of such exemptions which appeared to be required, however, as well as the inadvisability of attempting to frame statutory language to accommodate the variety and complexity of the situations involved, the present bill, while going somewhat beyond the House bill in this respect, does not attempt to meet by specific reference in the statute all of the situations for which it recognizes exemption to be merited.

The following are the situations for which the present bill contains a specific exemption from the notice and waiting period requirements:

1. Any acquisition of assets in the form of stock in trade used in the ordinary course of business by the corporation from which acquired.

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2. Any acquisition of stock as a result of which the acquiring corporation holds no more than 15 percent of the voting rights of the corporation from which acquired.

3. Any acquisition of stock in a corporation in which the acquiring corporation holds, as of the enactment date of this bill, more than 50 percent of the voting rights.

4. Any acquisition of stock, or of assets (other than stock in trade), where the price paid is no more than $1 million. Where part or all of the consideration paid is in the form of stock or other property, the fair market value of such stock or other property is to be used for the purpose of determining whether the transaction comes within the terms of the exemption. For purposes of the provision, a series of related acquisitions is to be treated in the same manner as a single acquisition. Thus a series of related transactions involving several acquisitions of less than $1 million each, but where the total consideration exceeds $1 million, would not be specifically exempt from the notice and waiting period requirement.

5. Any acquisition of stock or of assets where the combined net worth of the acquiring corporation and the corporation from which acquired is no more than $10 million. For this purpose it is presumed that net worth is normally reflected on the books of the respective corporation in accordance with generally accepted accounting principals which determine whether the transaction comes within the terms of the exemption.

6. Any acquisition of stock or of assets, the lawfulness of which requires the prior approval of a regulatory agency of the United States, wherever such approval, when granted, carries with it an exemption from the prohibition of section 7 of the Clayton Act.

While limiting the statutory exemptions to these specific situations, the bill provides broad authority to the enforcement agencies to waive all or part of the notice and waiting period requirements in any other situations. Such waivers may be granted on the basis of broad categories of cases, as well as on an individual case basis. By vesting in the enforcement agencies the broadest possible authority for granting waivers by administrative action while limiting the area of exemptions provided by statute, the bill places in the hands of the enforcement agencies powers which it is intended will be used liberally, within the limits of effective enforcement policy. This will accomplish by administrative techniques that which it is much less practical to attempt by a legislative device in dealing with the complicated and ever-changing pattern of corporate transactions. Specifically, it is intended that in establishing policies for the granting of waivers, the agencies will give full cognizance to the fact that the purpose of the bill is to subject to its advance notice provisions primarily those transactions whereby through purchase of stock or assets one corporation gains control of the business of another corporation, or of a subsidiary or division or other operating unit of such other corporation, and that these provisions are not directed at the wide range of other corporation activities which in the routine of ordinary business may involve transactions in stock or assets of other corporations. Under the Legislative Reorganization Act the committees of the Congress have a direct responsibility for exercising constant watchfulness over the administration of laws within their jurisdiction. The present legislation will benefit from a faithful exercise of this responsibility to help assure compliance with the congressional intention.

In the establishment of procedures or regulations for the granting of waivers, it is expected that ample opportunity will be provided for full public hearings. Such procedures or regulations are to be established within 120 days of the date of enactment of this measure, and the taking effect of the notice and waiting period provisions is to be delayed until the end of this interval. It need not be added that the procedures or regulations to be established within the time indicated are to reflect more than a mere token compliance with the requirement placed upon the agencies. It is expected also that the waiver procedures will make adequate provision for processing waiver requests with a minimum of "redtape," for avoiding duplication of effort between enforcement agencies and for fixing the responsibility for administrative action by each agency so as to avoid giving those seeking waivers an election as to which agency to deal with.

Existing legal rights.—In order to avoid interference with legal rights acquired prior to enactment of the amendments of section 7 contained in the present bill, the bill reenacts protection for such rights in the same language as contained in section 7 when first enacted in 1914. The effect of this provision is to maintain without legal impairment any contractual right which was lawfully obtained by a corporation before this measure shall have become law. At the same time, as in the similar provision contained in the original section 7, the bill makes it clear that such protection of existing legal rights does not make lawful anything which before the enactment of this measure was in violation of the antitrust laws.

Declaratory judgment.—Another provision of the bill provides that any corporation may file suit in Federal district court to adjudicate the legality of a proposed or consummated acquisition where the Attorney General or Federal Trade Commission has threatened suit or otherwise officially asserted the transaction to be illegal under the Clayton Act. A suit seeking such declaratory judgment may be brought in the District of Columbia or in any district in which the acquiring or acquired corporation resides or transacts business, whether or not further relief could be sought. The proposed acquisition shall not be consummated during the pendency of the suit. This measure further provides that in any such suit against the United States by a corporation seeking a declaration of its rights, it shall be the duty of the Attorney General to defend such suit. Whenever the ends of justice require that persons be brought before the court, subpenas may be issued summoning such persons, whether or not they reside in the district in which the court is held.

Injunctive powers.—Effective enforcement of section 7 requires that the Department of Justice and the Federal Trade Commission have clear authority to seek court action to enjoin mergers of questionable legality prior to their consummation. The Department of Justice now has such authority under section 15 of the Clayton Act. The Federal Trade Commission, although charged with concurrent responsibility for enforcement of section 7, has no such authority. The present bill clothes the Federal Trade Commission with authority to seek a court injunction to prevent consummation of a merger or to preserve the status quo until the complaint is dismissed by the Commission or set aside on court review.

This bill amends that provision in the House bill relating to a "proper showing" by providing that in an injunction proceeding the court shall have broad power to make such order as may be deemed

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just. This change is made because of the possibility that the language as enacted by the House might be construed as obliging a court to issue an injunction merely upon a showing by the Federal Trade Commission that it has reason to believe that an illegal stock or asset acquisition is occurring or has occurred and that the public interest would be served by enjoining such acquisition. The committee feels that the language in the House bill might impose a statutory limitation upon the court's authority in exercising its equity powers. It is felt that the Commission by this statute should not have greater authority than that enjoyed by the Attorney General under section 15 of the Clayton Act. The language of this amendment is intended to make clear that the courts in acting upon a petition by the Commission for a stay will be guided by precisely the same considerations which obtain in a similar proceeding brought by the Attorney General under section 15.

Analysis of Section 3

The purpose of section 3 is to narrow the applicability of the so-called good-faith defense to a charge of price discrimination brought under section 2 (a) of the Clayton Act, as amended, as this defense is interpreted in the Standard Oil of Indiana case.[1] The problem to which this bill is directed is the injury to competition through price discrimination. Under the doctrine enunciated by the Supreme Court in that case, regardless of the injurious effect on competition, it is a complete defense to a charge of price discrimination for a seller to show that his price differential was made in good faith to meet a lawful and equally low price of a competitor. Under section 2 (a) of the Clayton Act, as amended, price discriminations are declared to be unlawful where the effect may be (1) substantially to lessen competition or tend to create a monopoly in any line of commerce; or (2) to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. This section 3 draws a distinction between these two types of injury. Thus, it does not go so far as to protect all individual firms from the effects of price discrimination but it does seek to protect the public interest against price discriminations which may substantially lessen competition or have the tendency to promote monopoly. Under this section 3, the good-faith defense in section 2 (b) of the Clayton Act, as amended, will not be available where there is a reasonable probability that the effect may be substantially to lessen competition or tend to create a monopoly. Where the effect falls short of these standards good faith would still be a complete defense.

The need for legislation to preserve competition by protecting small business from price discrimination and other unfair practices is urgent. Since 1951 the ratio of business failures has risen over a third; according to Dun & Bradstreet the number of business failures rose from 31 per 1,000 firms in operation in 1951 to 42 in 1955. At the same time the trend of small-business profit has been sharply downward. In 1951 small manufacturing corporations with assets of less than one-quarter million dollars showed profits, as a percent of stockholders' investment, of 8.6 percent; by 1955 the rate had declined

[1] *Standard Oil Co.* v. *Federal Trade Commission* (340 U. S. 231 (1951)).

to only 2.2 percent. In contrast, the profit rate of the largest industrial corporation, those with assets of over $100 million, rose during this period from 13.3 to 14.6 percent.

The necessity for prompt action was emphasized by Mr. Watson Rogers, president, National Food Brokers Association, who testified before the subcommittee that a "two price system" is already developing in the food industry and that unless H. R. 1840 is enacted at the present session of Congress—

> a lot of the fine good people we have today will not be here next year when Congress can straighten out this situation we have today.

Public hearings were held by the subcommittee on the language contained in this section on June 21, 26, 27, 29, and 30, July 3 and 5, 1956, during which some 60 witnesses were heard, including spokesmen for interested trade associations and major industries. In addition, written statements were received from innumerable parties who expressed an interest in the proposed legislation. Previously, the subcommittee held public hearings on the general subject matter of this section on August 23, 24, 25, 26, 30, and 31, September 1 and 2, 1955, and heard more than a score of witnesses including economists and professors, who are specialists in this field of the law. In addition, extensive hearings totaling more than 4,000 pages of transcript, exclusive of exhibits, have been held on this issue before the House Judiciary Committee, the House Small Business Committee, and the Senate Small Business Committee.

Following its general ruling in 1951, the Supreme Court sent the Standard Oil of Indiana case back with instructions that the Federal Trade Commission make a finding as to whether the factual situation in that particular case accorded with and satisfied the requirements of the good-faith defense. The Commission found that good faith had not been present, but its findings have now been overturned by a recent ruling of the Seventh Circuit Court of Appeals.[2] In its brief before the court the Commission had stated that, "a finding of good faith would make the Robinson-Patman Act meaningless." Hence, although this section 3 involves the purely legal question of the type of defense applicable to a charge of illegal price discrimination the basic issue is whether we should remain content with a law which has been rendered meaningless or whether the public interest requires an effective restraint on price discrimination.

Arguments Against Price Discrimination

There are three types of arguments against price discrimination—economic, moral, and sociological. The economic argument involves both injury to sellers and injury to buyers. With respect to the former, the argument is that price discrimination gives to a large seller operating in many markets a weapon by which it can destroy or coerce into submission smaller sellers operating in one or a few markets. To the large seller any losses or low profits on sales in the markets in which the discriminatory low prices are made usually represent a small fraction of its total sales which can readily be offset by profits made elsewhere. By selectively following this practice in one market

[2] *Standard Oil Co. v. Federal Trade Commission*, U. S. Court of Appeals (7th Circuit), May , 1956.

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after another, the large seller can destroy competition in a series of markets, thereby gaining monopoly power.

With respect to injury to buyers, the argument is that price concessions granted to some buyers and not to others give to the former an advantage which, particularly in lines of trade characterized by low markups and fast turnover, may be decisive. This advantage exists regardless of whether the recipient of the concessions lowers its price (which its rivals are less able to do) or maintains its price (which enhances its cost-price margin thereby enabling the favored buyer to carry on more intensively other forms of competitive activity, such as sales promotion, advertising, etc.)

Behind these economic arguments is a considerable body of evidence indicating that discriminations in price generally have not reflected greater economic efficiency but rather the exercise of market power possessed by large sellers or buyers with some degree of monopoly control in the markets in which price is maintained. To the extent that price discriminations are made possible due to greater efficiency, the cost savings proviso of the Robinson-Patman Act,[3] which makes such savings a complete defense, is in no way altered by this legislation. Therefore, it cannot justifiably be said that this bill would give any advantage to less efficient firms over the more efficient ones.

Price discrimination is also objectionable on moral grounds. The giving of advantages to some and not to others is difficult to reconcile with the moral code, or with the political foundations on which our Government is based. The contradiction inherent between price discrimination and the precepts upon which our society was founded were brought out in testimony by Mr. Mel Foer, a small-business man representing a veterans' organization, in hearings during 1951 on this very good-faith issue. Objecting to price discrimination on the grounds that it represents a form of favoritism in conflict with the "American principles of fair play," Mr. Foer said:

> The legalization of * * * discriminations would in my opinion, be very harmful to small firms, especially to new firms. You get concessions only after you have been in business for a while and have attained a position in the trade. The small new firm seldom, if ever, gets concessions. This means simply that the veteran trying to go into business for himself will not get concessions but that his larger, established rival will. I can think of nothing more disruptive to their hopes and aspirations than the almost certain knowledge that in going into business they will have to pay a high price for their merchandise while their established competitors will pay a low price.[4]

The sociological argument against price discrimination is that social gains in the form of greater participation in civic enterprises, higher levels of civic welfare, a better status of political democracy, and greater economic opportunity exist in an economy composed mainly of a large number of small enterprises, rather than in one in which

[3] SEC. 2 (a) "* * * *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchases sold or delivered."

[4] Hearings before a subcommittee of the Select Committee on Small Business, U. S. Senate (82d Cong. 1st sess., June 1951, p. 152).

economic activity is largely centralized in a few giant corporations;[5] that these social gains represent the essence of the American heritage, and that price discrimination, by tending to induce greater concentration, imperils these gains.

Arguments in Favor of Price Discrimination

The principal economic argument advanced in recent years on behalf of price discrimination is to the effect that restraints on the practice tend to increase price rigidity. It is contended that, given the degree of industrial concentration which already exists, freedom to discriminate in prices leads to more competition than a legal restraint against price discrimination. The argument runs that in a concentrated industry each competitor will be reluctant to reduce his prices when he can do so only in an open and across-the-board manner, but that he may be induced to make a price concession here and there when it can be done secretly. Since secrecy is thus a requirement, this means that a seller will shade his price only to a few buyers who purchase in large volume. Once made, these price concessions are said to spread, with the result that they gradually "erode" into a general price cut, resulting in a lower price to consumers than that which prevailed before the price discrimination was made.

While the argument possesses certain elements of plausibility, it is subject to strong reservations. Parenthetically, although the question of the cause of price rigidity has been the subject of a number of exhaustive empirical inquiries, the explanations generally run in terms of the level of concentration, the characteristics of the product, and cost behavior. Price discrimination has never been identified in these studies as a factor making for price flexibility. Objections to the "erosion" theory are that it is as yet unsupported by any organized body of data, or indeed by any persuasive illustrations, that there is no necessary reason to assume that the recipients of the price concessions will in point of fact pass them on to consumers, and that such evidence as exists suggests that concessions tend to be wrung not from large sellers but from small sellers in industries of low concentration. Thus, in their study of the A. & P. case, Professors Dirlam and Kahn state:

> Of the 36 companies which the Government alleged in its brief on appeal had yielded to A. & P. pressure, 21 were not in Moody's; the majority were relatively small and subject to intense competition.[6]

We are now asked to reject the sizable body of knowledge gained from investigations and enforcement of the law extending over a period of more than half a century in favor of a hypothetical and yet unsupported theory. Thus it is the opponents of this section who rest their case on pure theory and speculation.

History of Congressional Efforts To Curb Price Discrimination

It has been the national policy of the United States to preserve competition by placing restraint on price discrimination since 1880

[5] S. Doc. 135, Small-Business and Civic Welfare, 1946 (79th Cong., 2d sess.).
[6] Joel B. Dirlam and Alfred E. Kahn, Antitrust Law and the Big Buyer: Another Look at the A. & P. Case (the Journal of Political Economy, April 1952, p. 129).

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when Congress enacted the Interstate Commerce Act. That act sharply limited the extent to which railroads could favor one shipper as against another, one community as against another, or one region as against another through preferential freight rates. The use of the same practice in industry was one of the compelling reasons for the passage of the Sherman Act in 1890. For a variety of reasons, however, the Sherman Act from almost its very inception proved to be an ineffective instrument against price discrimination. The trusts created during the great consolidation movement at the turn of the century owed their growth in no small part to this practice. Because of the ineffectiveness of the Sherman Act in halting the monopolization of industry, Congress in 1914 passed the Clayton Act, the purpose of which was to curb the practices by which monopoly is created. On the basis of exhaustive investigations conducted by the Commissioner of Corporations and the Bureau of Corporations, as well as from experience gained in enforcing the Sherman Act, Congress legislated against certain business practices which, unless arrested, would tend to lead to monopoly—notably price discrimination, exclusive dealing and mergers. As set forth in H. R. 627 of the 63d Congress, the prohibition against price discrimination was directed at the practice of large concerns:

> * * * to lower prices of their commodities, oftentimes below the cost of prices of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in a particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must, of necessity, recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities (p. 89).

The prohibition, however, was accompanied by what was known as the good-faith defense, which, over the years tended to nullify the prohibition itself. The debilitating effect of this defense was described by the Federal Trade Commission in the final report of its chainstore investigation submitted on December 14, 1934 (S. Doc. No. 4, 74th Cong., 1st sess.). After describing the widespread extent and character of price discriminations in chainstore operations, the report stated:

> Variation in price between different branches of a chain would seem to be a discrimination, the effect of which may be to produce the forbidden results. It is one thing, however, to reach such a broad conclusion on the results of this practice by chains in general and quite another to prevent by legal means its use by some particular chain. The reason is that the Clayton Act itself specifically permits price discrimination in the same or different communities made in good faith to meet competition. The Commission has no evidence which would establish that price discrimination by chainstores has not been in good faith to meet competition and there is good ground to conclude that in many cases it has been for that purpose.

In recommending legislation to correct the conditions described in the chainstore investigation, the Federal Trade Commission went so far as to advocate that the good-faith proviso be eliminated entirely from the statute.

In order to arrest the widespread destruction of small business in the early thirties, Congress, in 1936, acted to strengthen the law against price discrimination by passing the Robinson-Patman amendment to section 2 of the Clayton Act. Up to the time of the Standard Oil of Indiana decision in 1951, the Federal Trade Commission regarded the good-faith defense under the Robinson-Patman amendment as merely a procedural defense. Support for this interpretation is to be found in the statement by the chairman of the House managers in reporting the conference version of the Robinson-Patman bill to the House of Representatives:

> This does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substitute rights, liabilities and duties. * * * If this proviso were construed to permit the showing of a competitive offer as an absolute bar to liability for discrimination then it would nullify the act entirely of the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations of competing sellers of the same product. (80 Congressional Record, 9418 (1936).)

Further support for this position can be found in numerous statements to the same general effect by the sponsor of the bill in the House of Representatives, Congressman Wright Patman. Moreover, its sponsor in the Senate, Senator Robinson, stated:

> I think the latitude would be too broad if we merely said that "nothing herein contained shall prevent discrimination in price in the same or different communities made in good faith to meet competition." The authority thus granted might be employed notwithstanding there was an effort to meet competition in ways that would be questionable.[7]

But in its decision in the Standard Oil of Indiana case in 1951 the Supreme Court held otherwise. It ruled, in a 5–3 decision, that under the Robinson-Patman amendment good faith was still a complete defense to a charge of price discrimination, regardless of the injury to competition resulting therefrom.

The need for modifying that decision constitutes adequate grounds in and of itself for the enactment of this legislation. But since 1951 two other decisions by the courts have supplied additional reasons for the passage of the language contained in this section. One of these decisions, rendered by the Court of Appeals for the Seventh Circuit (cit. supra), involves the question of whether the price discriminations in the Standard Oil of Indiana case were, in fact made in good faith. The other decision, rendered by the Court of Appeals for the Ninth Circuit in *Balian Ice Cream Co., Inc.* v. *Arden Farms Co., et al.* (231 Fed. 2d 356), for which certiorari was denied, involved discriminations by Arden, a large interstate operator, against its small local com-

[7] Congressional Record, April 30, 1936, cited in FTC, Robinson-Patman Act, Congressional Expressions and Formal Decisions, February 1942, p. 36.

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petitors in the Los Angeles market area. Taken together, these decisions appear to widen the scope of the good-faith defense significantly. If these decisions stand, there is ground for the fear that a seller charged with price discrimination will be able to avail himself of the defense even though what he is meeting is not the equally low price of a competitor, but "competitive conditions," even though he is not merely meeting but beating a competitor's price, even though the discrimination is made not to retain but to obtain a customer, and even though the practice is not an occasional or sporadic concession but is of a persistent and systematic nature. The need for this legislation already existed following the decision in 1951; these recent rulings have made it even more necessary today.

Freight Absorption

Witnesses testifying before this committee have expressed concern regarding the effect of this section with respect to the legality of sellers absorbing freight charges in whole or in part to meet a lower price of a competitor. The committee is aware of the fact that in a nonconspiratorial good-faith situation the absorption of freight charges by an individual seller may promote competition and afford buyers the benefits of not only price competition but also quality and service competition. The committee desires to emphasize that it is not the purpose of this section to restrict or impair this desirable type of competition.

In the heavy-product industries particularly, the cost of freight is a significant factor. If a seller desires to sell in distant markets, where another seller or sellers may have an advantage freightwise, the former may find it desirable to absorb freight charges in order to sell in such markets, assuming that other cost factors are equal. As to this, the Supreme Court, in *F. T. C.* v. *Staley* (324 U. S. 746), stated:

> For we think it could not be said that this practical continuation of the present discriminatory basing point system would be in good faith. But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price. * * * Congress has left to the Commission the determination of fact in each case whether the person charged with making discriminatory prices acted in good faith to meet a competitor's equally low prices.

The principle thus stated would continue to be the law if this bill were enacted. The absorption of freight charges by sellers is not illegal per se under existing law. The absorption of freight charges by sellers would not be illegal per se, if this bill were enacted.

A review of the cases initiated by the Federal Trade Commission since the Robinson-Patman Act was adopted in 1936 reveals that, without exception, in those cases in which the practice of absorbing freight was attacked as an illegal price discrimination, the respondents were either also charged in the same complaints with engaging in unlawful price conspiracies or the good-faith defense was not legally available to the respondents for a different reason.

Thus, in *F. T. C.* v. *The Cement Institute, et al.* (268 U. S. 588), the Commission was sustained by the United States Supreme Court in finding that the practice of freight absorption was an integral part of an unlawful price-fixing conspiracy. Since the enactment of the Robinson-Patman Act, there have been only two cases in which the Commission has attacked freight absorption as an illegal price discrimination without also alleging a conspiracy to fix prices in the same complaint. A majority of the Commission in 1947, in answer to a question of the Senate Interstate and Foreign Commerce Committee, described the background of these cases (*F. T. C.* v. *Staley Mfg. Co. et al.* and *Corn Products Refining Co. et al.* v. *F. T. C.* (324 U. S. 726)) as follows:

> In the Staley and Corn Products cases brought on charges of price discrimination under the Clayton Act as amended, the Commission did not charge a conspiracy. However, the discriminations in price found in those cases, which were so great as to raise questions how they could persist under competition, may have been due to a conspiracy. For, in 1932 the respondents, in these cases consented to a decree in a Sherman Act case involving the charge of price fixing, and in 1947 the Commission found it necessary to include these respondents with others in a proceeding now pending in which a price-fixing conspiracy is charged.

The Supreme Court held in deciding the Staley and Corn Products cases that the respondents therein were not absorbing freight to meet a lawful price but were absorbing freight to meet an unlawful price. And in *F. T. C.* v. *Standard Oil of Indiana* (340 U. S. 231), the Supreme Court specifically held that the good-faith defense under section 2 (b) of the Clayton Act is available only if the equally low price to be met is a lawful price. Thus the good-faith defense would not be available under existing law in factual situations such as those which existed in the Staley and Corn Products cases for the additional reason that the respondents in those situations are not absorbing freight to meet a lawful price of a competitor.

The enactment of this bill, therefore, would not change the law as it has been applied to decided cases involving freight absorption. Prior to the decision of the Standard Oil of Indiana case by the Supreme Court in 1951, the Commission contended that the good-faith defense was a procedural and not a complete defense to a charge of price discrimination under section 2 (a) of the Clayton Act. It is common knowledge that during the period from 1936 to 1951, the practice of freight absorption was extensively used in a great many industries. However, during that period the Commission did not issue a single complaint questioning the legality of freight absorption in nonconspiratorial situations or where the seller individually was meeting a competitor's lawful price. Under this bill, unlike the legal situation which was believed by the Commission to exist prior to 1951, good faith would be a complete defense to a charge of price discrimination in those factual situations where the injury is not of such scope or dimensions as to constitute a substantial lessening of competition or tendency to create a monopoly. In view of the fact that no such complaint has been issued in the past, there is little reason to suppose that the Commission would issue a complaint chal-

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lenging the absorption of freight in nonconspiratorial, good-faith situations, if this bill were enacted.

The committee feels that in the light of past experience, the effect of this bill on freight absorption, insofar as it might cause the Commission to issue complaints in situations in which the Commission would not under existing law issue such complaints, is so slight and improbable that it is not a significant factor in considering the effects of the bill.

This committee sees no objections, generally, to a seller in good faith absorbing freight to meet the lawful and equally low price of a competitor in nonconspiratorial, individual competitive situations. On the other hand, neither freight absorption nor any other pricing practice should be available as a defense under the guise of good faith in cases in which sellers are engaged in concert of action or collusion in price making. A defense to a charge of price discrimination brought under section 2 (a) of the Clayton Act is irrelevant to a charge of unfair methods of competition or unfair acts or practices brought under section 5 of the Federal Trade Commission Act.

Some witnesses before the subcommittee appeared to be under the misapprehension that this bill would put an end to freight absorption in those circumstances where it promotes competition. Obviously, where freight absorption promotes competition it cannot also injure competition. The contention is thus self-contradictory. It has been noted that neither the Federal Trade Commission nor the courts have acted to prohibit or interfere with delivered pricing or freight absorption when innocently and independently pursued with the result of promoting competition. Therefore, it cannot justifiably be said that this section will interfere with any pricing practice (freight absorption or otherwise) which maintains or enhances competition. However, to lay the matter to rest, the committee has specifically included language so as to insure that the provisions of this section shall not be construed to alter the law applicable, before the enactment of this amendment, to the absorption of freight or of shipping charges.

INTERSTATE COMMERCE

A considerable number of witnesses representing jobbers in the gasoline industry appeared in opposition to H. R. 1840. Quite apart from the merits or demerits of their arguments, the apprehension of these jobbers appear for the most part to be without foundation. In proceeding against any firm under the Clayton Act it is necessary to show that it is "engaged in commerce." Jobbers who sell gasoline to service stations within their own State have not been regarded, insofar as such sales are concerned, as being "engaged in commerce" under that act even though they may have purchased their gasoline from an out-of-State refinery.

This legal principles appears to be well established (*F. T. C.* v. *Bunte Bros., Inc.*, 312 U. S. 349 (1941)). The Federal Trade Commission has recognized and acted upon the principle. Letters from responsible officials of the Commission were presented in evidence during the hearings showing that the Commission had declined even to investigate complaints involving sales from gasoline jobbers to dealers on the grounds that interstate commerce was not involved. Further, there is no record of any case in which the Commission has proceeded against

an oil jobber under the Clayton Act for discriminating in price in connection with the sales made by such jobber.

Mr. Otis Ellis, who appeared for the National Oil Jobber's Council, asserted that jobbers are in interstate commerce by reason of "producing goods for interstate commerce" and actions "affecting commerce." These are not, however, the tests of interstate commerce provided in the Clayton Act but rather are the tests which are applicable to conduct under various other statutes.

SUBSTANTIAL LESSENING OF COMPETITION OR TENDENCY TO CREATE A MONOPOLY

This section provides that the good-faith defense shall be a complete defense unless the effect of the discrimination—

> may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

Under this bill, therefore, the good-faith defense would be a complete defense to a charge under section 2 (a) of the Clayton Act as amended if the effect of the discrimination is merely—

> * * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them;

The bill thus recognizes that there is a significant and important difference between the test of injury to competition "with any person" as described above and the test of injury which may substantially lessen competition or tend to create a monopoly. There has been no case decided by the courts which has specifically distinguished between these two tests. The reason for this is that the Commission has used both of these tests inseparably in its complaints and findings and, therefore, there has been no necessity or occasion for distinguishing between the two types of injury.

If a seller makes price concessions to one buyer but does not also grant such price concessions to his other customers, competing with the favored buyer, then the latter may have a competitive advantage over the nonfavored customers. Where this is true, the effect of the discriminations may be to injure, destroy or prevent competition with this favored customer. Here, the good-faith defense under this bill would still be a complete defense. However, if and when the effects flowing from the price discriminations have a sufficiently serious impact on competition to come within the test of "substantially to lessen competition or tend to create a monopoly," then such price discriminations should be prohibited and "good faith" should not be available as a defense. The good-faith defense, which is intended to preserve and enhance competition, should not be permitted where its use may have the opposite effect of substantially lessening competition. The proposed legislation thus would modify what we feel to be a misinterpretation of the law by the Supreme Court in the Standard Oil of Indiana case.

There may be instances where injury to a competitor may also injure competition in a line of commerce. For illustration, in the case of *E. B. Muller & Co. et al.* v. *F. T. C.* (1942 Fed. (2) 511), 2 allied companies were operated as a unit and had only 1 competitor in the United States. These respondents attempted to drive this lone com-

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petitor out of business and one of the means they used for such purpose was a territorial price discrimination. Injury to this sole competitor sufficient to threaten its continuous existence was obviously such an injury to competition because this competitor was the only competition which the respondents had. In this case, therefore, injury to a competitor was tantamount to injury to competition in a line of commerce. This is not a typical case, however, because usually there are a significant number of competitors and injury to one competitor would not ordinarily constitute an injury to competition in a line of commerce.

The seller who grants a price discrimination to one of his customers and not to other competing customers is usually in a better position to know the probable effects of his discrimination than anyone else at the time he takes his action. The seller who is thus in the best-informed position to determine the probable effect of his price discrimination, may under this bill grant such discriminations in good faith as long as the effects of the discriminations are not of such scope or dimensions as to result in a probable substantial lessening of competition.

One witness before the subcommittee observed that the test under the proposed legislation would be different from the standard under the amended section 7 of the Clayton Act in that the latter contains the additional phrase "in any section of the country." The reason for the omission in this bill is merely to avoid a redundance. To a far greater extent than is true of mergers the impact of price discrimination tends to fall on a particular section of the country.

Analysis of Section 4

STATEMENT OF PROVISIONS

The bill amends section 18 (c) of the Federal Deposit Insurance Corporation Act in several ways.

First, it subjects to the requirement of advance approval by an appropriate Federal banking agency all bank mergers, consolidations, acquisition of assets, or assumption of liabilities except where the acquiring, assuming, or resulting bank is neither a national bank, a District of Columbia bank, a member of the Federal Reserve System, or an insured bank under the Federal Deposit Insurance Corporation. The effect of this provision is to bring within the jurisdiction of these agencies many bank mergers which under present law do not require any Federal approval.

Second, the bill requires that in passing upon proposed bank mergers the banking agencies must take into account, in addition to the factors now provided under the FDIC Act, the effect of the transaction upon competition.

Third, the bill stipulates that before acting upon any bank merger, each appropriate agency is to provide an adequate opportunity for an expression of views by the other banking agencies and an opinion by the Attorney General as to the competitive effect of the proposed transaction.

DIFFERENCES FROM HOUSE BILL

The provisions of this bill with respect to bank mergers or acquisitions are considerably modified from those contained in the House bill as follows:

1. The House bill subjects bank asset acquisitions, by which virtually all bank mergers are consummated, to the same legal tests concerning competitive effect which are now applied under section 7 of the Clayton Act with respect to other types of corporate mergers. Under this test, the effect upon competition is the only standard for determining the legality of a transaction. The present bill provides that the competitive factor is to be duly considered, along with banking factors, in determining whether to approve or disapprove a transaction.

2. The competitive test in the present bill is whether the effect of the transaction may be "to lessen competition unduly" or to tend "unduly" to create a monopoly, whereas the test in the House bill is that contained in the Clayton Act generally; i. e., whether the effect may be "substantially" to lessen competition or to tend to create a monopoly.

3. The House bill gives concurrent jurisdiction over bank asset acquisitions to the Department of Justice and the Federal Reserve Board. Under the present bill, the Department of Justice is not given any jurisdiction with respect to such mergers, and the authority to approve or disapprove a transaction is divided among the Comptroller of the Currency, the Federal Reserve Board, and the Federal Deposit Insurance Corporation, depending upon whether the acquiring, assuming, or resulting bank is a national or District bank, a State member bank of the Federal Reserve System, or a nonmember insured bank, respectively.

4. The present bill provides for advance approval of bank mergers by the appropriate banking agency by means of administrative action, following an expression of views and of an opinion by the other banking agencies and the Attorney General, respectively, whereas the House bill provides for formal legal proceedings of the same nature as those authorized in section 7 for other types of mergers.

EXPLANATION

The committee is convinced that only by subjecting bank mergers to a more stringent standard of competitive effect than is possible under present law will an effective means of coping with the rising trend of bank mergers or acquisitions be provided. It is evident that in applying such a standard, the special problems of the banking business, as compared with the general run of commercial activities, must be taken into consideration, and that the bank supervisory agencies are peculiarly familiar with those problems. It is expected that in weighing the effect of a proposed bank merger upon competition the banking agencies will view sympathetically transactions which stem from the failing conditions, unsound assets or capital structure, or incompetent management of the defunct bank, or from other special circumstances which might otherwise lead to a serious deterioration of banking services or conditions in the community or communities affected. While the bill vests in the banking agencies exclusive authority for approving bank mergers, and adds the competitive factor to the criteria for approval instead of making the competitive criteria of paramount and overriding importance, it is not intended that these agencies, in administering the authority, will give mere lipservice to the effect of a proposed merger upon competition. The addition to the competitive test to those already contained

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in the Federal Deposit Insurance Corporation Act is expected to make a substantial difference in the standards applied by the banking agencies in determining whether to grant or withhold consent for proposed bank mergers and acquisitions. In order to assist the banking agencies in discharging their responsibilities for giving due weight to the effect of a proposed merger upon banking competition, the bill requires that in any individual case the appropriate agency having jurisdiction shall provide sufficient opportunity for an opinion from the Attorney General concerning such effect. It is expected that the mechanics of obtaining such an opinion will be worked out cooperatively and practically so that the opinion may be rendered in a timely manner without unnecessarily impeding orderly administrative action.

Accordingly, the committee recommends favorable consideration of H. R. 9424, as amended.

In the opinion of the committee it is necessary to dispense with the requirements of subsection (4) of rule XXIX of the Standing Rules of the Senate in order to expedite the business of the Senate.

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84TH CONGRESS
2d Session

SENATE

REPORT
No. 2818

MOTION-PICTURE DISTRIBUTION TRADE PRACTICES—1956

REPORT

OF THE

SELECT COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

PROBLEMS OF INDEPENDENT MOTION-PICTURE EXHIBITORS

JULY 27, 1956.—Ordered to be printed

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84TH CONGRESS } SENATE { REPORT
2d Session } { No. 2818

MOTION-PICTURE DISTRIBUTION TRADE PRACTICES—1956

JULY 27, 1956.—Ordered to be printed

Mr. HUMPHREY, from the Select Committee on Small Business, submitted the following

REPORT

I. INTRODUCTION

The past 10 years have represented the greatest era of general prosperity in our Nation's history. It has been a period of high employment, soaring personal income, record-breaking corporate profits, rising retail trade, and a booming stock market. One of the few conspicuous exceptions to this glowing era has been the motion-picture industry—in particular the small independent theater owners who have been suffering heavy reversals.

The exhibitors' plight is readily seen by examining industry statistics for the past decade. In 1946, motion-picture attendance hit an all-time high with an average of more than 82 million paid admissions a week. Last year, weekly average attendance was down to less than 46 million which represents a drop of 45 percent during a period when the population rose by 26 million. Admissions this year are running far below 1955; unless business picks up soon, it will mean the poorest year since depression days of the thirties.[1]

In this same 10-year period, the number of conventional 4-wall theaters dropped from 18,709 to 14,613 in spite of the rising population and the growth of suburban developments throughout the entire country.

In 1946, the public paid $1.5 billion (excluding tax) to go to the movies as compared to $1.185 billion in 1955; this included admission receipts of the 4,600 drive-in theaters built since the war.

Currently, theaters on a consolidated basis have operating costs in excess of their income from admissions and many exhibitors are only able to survive through the sale of refreshments.

[1] Statistics used in this report, unless otherwise noted, are from reports of Sindlinger & Co., Inc., Ridley Park, Pa., a fact-finding organization which has done considerable research in the motion-picture industry on behalf of producers, distributors, and exhibitors. The accuracy of its data is attested to by comparing its statistics with those of the Bureau of the Census.

The majority of the motion-picture theaters are owned and operated by small-business men. These are the people who have been hardest hit by the economic reversals of the motion-picture industry. The large circuits which own the choice first-run theaters have been able to continue successful operations although their margin of profits has diminished.

In 1953, in answer to communications from exhibitors in all parts of the country who told of their economic distress, the Select Committee on Small Business held 12 days of hearings to inquire into the problems of independent motion-picture exhibitors.[2] Testimony was received from exhibitors, producers, distributors, and the Department of Justice. The major complaints of the exhibitors were in reference to such matters as clearances, availability, competitive bidding, film rental and the supply of feature pictures. The contention was made that the policies of the producers and distributors were jeopardizing the position of the independent theater owners.

After careful examination of the testimony, the committee issued a report in which it stated the following conclusions and recommendations:

> Independent motion-picture exhibitors operate considerably more than half of all the theaters in the United States. They bring in the great bulk of the domestic revenues of the motion-picture industry. Their vitality and prosperity is the key to the welfare of the entire industry. It is apparent from the record that the independent exhibitors have many grievances against the distributors. The major question before the committee was how best to meet these grievances in order to stem the tide of failures among independents and to bring better order to the industry.
>
> On the basis of the entire record two courses suggest themselves as the best means for achieving these objectives. The first is a voluntary system of arbitration within the motion-picture industry.
>
> The second is a more forceful and more vigilant policy on the part of the Antitrust Division of the Department of Justice in assuring compliance with the decrees resulting from the extensive litigation against the major motion-picture companies.
>
> Arbitration is not a panacea but it would provide an inexpensive and expeditious means for settling many of the exhibitors' complaints relating to trade practices in the distribution of motion-picture film. Such matters as clearances and runs, prereleases and competitive bidding would lend themselves readily to arbitration. The record indicates that these constitute the great bulk of the complaints registered by exhibitors.[3]

In the 3 years which have elapsed since consideration of this matter, the problems confronting the exhibitors have, if anything, become even more critical. It is with considerable regret that the committee notes no voluntary arbitration system has yet been agreed upon by distributors and exhibitors although there can be little doubt that such

[2] Motion-Picture Distribution Trade Practices, hearings before a subcommittee of the Select Committee on Small Business, United States Senate, 83d Cong., 1st sess., 1953.
[3] Problems of Independent Motion-Picture Exhibitors, Select Committee on Small Business, United States Senate, S. Rep. No. 835, 83d Cong., 1st sess., 1953.

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a system would be of great value if for no reason than to help bring about an end to the constant strife within the industry which in the committee's opinion serves no constructive purpose whatsoever.

This spring, in answer to exhibitors' requests, the committee again agreed to examine the problems of the independent theater owners with particular attention as to what steps have been taken to put into effect the recommendations contained in the committee's 1953 report. Hearings were held by the Subcommittee on Retailing, Distribution, and Fair Trade Practices on March 21, 22, May 21 and 22.[4] A résumé of the testimony presented at these hearings is contained in section II of this report.

The problems which confront the motion-picture industry, and especially independent exhibitors, are most unusual, many, and complex. In studying this matter the committee recognized that there are no easy answers. Many of the difficulties are a direct result of a change in the amusement habits of the American people. It is felt, however, that steps can be taken which will help the small exhibitors throughout the country who are presently suffering severe financial losses. If men on both sides of the industry put their minds to it, the committee is confident a workable solution can be arrived at.

II. Background

(A) Industry control prior to the Paramount case

The Justice Department's victory in 1948 in the Paramount case[5] resulted in divorcement of theaters from the production-distribution phase of the industry, the divestiture of certain theater holdings of the newly formed divorced circuits in order to open up closed situations, and an end to compulsory block booking, price fixing, and discriminatory treatment of the small theaters by way of unreasonable clearances. (See Appendix I for definition of terms.)

Prior to that decision, the motion-picture industry was tightly controlled by five major companies—RKO, Paramount, Loew's (MGM), Warner Bros., and Twentieth Century-Fox—which produced, distributed, and exhibited pictures, and three smaller companies—Universal and Columbia which produced and distributed pictures but owned no theaters, and United Artists which only distributed pictures.[6]

These companies produced 70 percent of all the feature pictures made in the United States and virtually all of the high-quality pictures. Their control of distribution was even greater with 95 percent of the so-called A films, which bring in big box office returns, being released by these eight companies. The Big Five collected 70 percent and the other 3 collected 25 percent of all film rentals in the entire country.

Independent producers and distributors were restricted to low-cost pictures such as westerns, mysteries, and crime stories which were not shown in first-run theaters.

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[4] Problems of Independent Motion-Picture Exhibitors, hearings before a subcommittee of the Select Committee on Small Business, United States Senate, 84th Cong., 2d sess., 1956.

[5] *U. S.* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131 (1948).

[6] For a comprehensive analysis of the industry organization before the Paramount decision, see The Motion Picture Industry—a Pattern of Control, Temporary National Economic Committee, Monograph No. 43, 76th Cong., 3d sess., 1941; also *U. S.* v. *Paramount Pictures, Inc., et al.*, Equity No. 87-273, in the District Court of the United States for the Southern District of New York, amended and supplemental complaint, Nov. 14, 1946.

To complete their pattern of control, the Big Five owned or controlled most of the high grossing theaters. Although they owned only 16 percent of the total number of theaters in operation, they had more than 80 percent of the metropolitan first-run theaters and a complete monopoly of first-run theaters in such cities as Boston, Brooklyn, Chicago, Cleveland, Kansas City, Milwaukee, Minneapolis, Philadelphia, St. Paul, and Washington, D. C. Of the 92 cities with populations of more than 100,000 as of the 1940 census, the major companies controlled exhibition in 73 which included all of the cities with populations over 1 million—New York, Chicago, Philadelphia, Detroit, and Los Angeles. These theaters which were owned by the Big Five accounted for 45 percent of the total domestic film rentals received by the 8 major distributors.

The big film companies had come to realize that it was to their economic advantage to cooperate with one another rather than to compete in the exhibition field. What gradually emerged was a pattern whereby the majors, to a considerable extent, had their theaters located so as not to be in competition with each other. The district court in the Paramount case observed that "there appears to have been little, if any, competition among the 5 defendants or any of them in 97 percent of the towns (under 100,000 population) and in respect to 95 percent of the theaters in which they had an interest." [7] The court also noted that even in towns of more than 100,000 population, "the effect of the geographical distribution * * * was substantially to limit competition among the major defendants." [8] Even where the majors did have theaters located in the same competitive area with one another, there was a very cooperative arrangement "in which competition was largely absent and the status of which was maintained by fixed runs, clearances and prices, by pooling agreements and joint ownerships among the major defendants, and by cross licensing which made it necessary that they should work together." [9]

Under such a convenient system it was only natural that the small theater owners would be the ones to suffer. They were denied the right to show pictures released by the eight major distributors until after they had been first shown by the Big Five's own theaters and the large circuits which were given unreasonably long clearances. In licensing of films to independent exhibitors, distributors set a minimum admission price which could not be infringed upon and film rental charges were oftentimes intentionally made too high, to force the exhibitor to raise his admission price, thereby causing many patrons to ignore their neighborhood theaters and go instead to the first-run houses owned by the majors. The film companies gave each other preferred treatment in rental of pictures which only made the plight of the independent exhibitors more difficult.

Independent exhibitors were not permitted to rent individual pictures of a distributor. They usually were required to take a whole set of releases, normally a year's output at a time. In some cases, exhibitors did not even know what the pictures were they were contracting for, and they often had to take certain pictures on certain days as specified by the distributors. Under this system, distributors were able to force off upon exhibitors many mediocre pictures whether they wanted them or not.

[7] *U. S.* v. *Loew's Inc., et al.*, 85 F. Supp. 881, 890 (1949).
[8] Ibid., p. 892.
[9] Ibid.

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The Supreme Court in the Paramount case declared that there had been discrimination against the small independent exhibitors in restraint of trade as condemned by the Sherman Act. As the Court stated:

> The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built.[10]

(B) THE PARAMOUNT CASE

The Department of Justice, after long and careful study of the motion-picture industry, filed a suit in July of 1938 in which it charged the eight major motion-picture companies with a combination and conspiracy to restrain and monopolize interstate trade in the distribution and exhibition of films by way of theater ownership and other means.[11]

On November 20, 1940, a consent decree was entered as to the 5 major producers in which (1) an arbitration system was established to help settle complaints of exhibitors as to unreasonable clearances, the forcing of pictures by distributors and the question of runs; (2) features could not be licensed in blocks of more than 5; (3) exhibitors were permitted "trade showings" before a picture was licensed; and (4) none of the 5 majors were to engage in a program of expanding their theater holdings.

The Department of Justice was not satisfied with the results of the consent decree and in August of 1944, it sought to have the decree modified and asked the district court to order divorcement of the theaters from the production-distribution phases of the defendants' operations. In 1946, the district court found the eight defendant companies to have engaged in a national conspiracy in restraint of trade through various methods including the fixing of admission prices which independent exhibitors were forced to charge in order to obtain defendants' pictures.[12] The court did not order divorcement, but it did order certain reforms such as the licensing of films one at a time by way of competitive bidding, enjoining the Big Five from further acquisitions of theaters, prohibiting the fixing of admission prices, prohibiting clearances between theaters not in substantial competition and unreasonable clearances between theaters in substantial competition, and the end to theater pool arrangements existing between the defendants.

The Supreme Court in May 1948, upheld the district court as to violation of the Sherman Act by the defendants and approved the injunctions against various trade practices such as price fixing and compulsory block-booking.[13] The Court, however, eliminated the order that pictures be licensed by way of competitive bidding and it

[10] *U. S.* v. *Paramount Pictures, Inc., et al.*, 334, U. S. 131, 162 (1948).
[11] *U. S.* v. *Paramount Pictures, Inc., et al.*, Eq. No. 87-273 (S. D. N. Y. 1938).
[12] *U. S.* v. *Paramount Pictures Inc., et al.*, 66 F. Supp. 323 (S. D. N. Y. 1946), 70 F. Supp. 53 (S. D. N. Y. 1946).
[13] *U. S.* v. *Paramount Pictures Inc., et al., op cit.*

directed the district court to reconsider the adequacy of its decree and to reexamine the question of divestiture.

In light of the Supreme Court having ruled out the competitive bidding requirements, the district court on July 25, 1949, held that divestiture of theaters by the five major companies was necessary and that separate and independent companies were to be established to take over the theater circuits of these companies.[14] The eight defendant companies were prohibited from compulsory block booking, price fixing, granting of clearances between theaters not in substantial competition and unreasonable clearances between theaters in substantial competition, and the granting of any special privileges to theater circuits.

The five majors by 1952 had all entered into consent judgments which provided for the divorcement of production-distribution assets from exhibition assets with no interlocking officers or directors. The divorced theater circuits were required to dispose of 1,200 theaters in locations where they had no competition. The new theater companies resulting from these consent judgments were RKO Theaters Corp., National Theaters, Inc. (formerly a part of Twentieth Century-Fox), United Paramount Theaters Corp. (later joined with American Broadcasting Co.), Stanley Warner Corp., and Loew's Theaters, Inc.

There can be no doubt that the Government's victory in the Paramount case resulted in opening up a tightly controlled industry which had discriminated against independent theater owners.

Today an independent exhibitor cannot be forced to take pictures which he does not want nor can he be told what his admission price must be. If an independent theater owner is entitled to an earlier run he can demand and obtain it. No longer can distributors discriminate in the sale of pictures; a person who owns one theater has as much right to a picture as does a giant circuit. In short, independent exhibitors are now entitled to equal treatment in accord with our basic concept of a free economic structure.

Although independent exhibitors achieved the right to fair and equal treatment as a result of the Paramount case, they nevertheless find themselves today in a most precarious economic position. Some claim this is due to divorcement itself. One theater owner told the committee that "divorcement, more than any other factor, is responsible for the dearth of product and high film rentals".[15] Allied States Association of Motion Picture Exhibitors, which represents thousands of independent exhibitors, vigorously disagrees with this contention. Abram F. Myers, chairman of the board and general counsel of Allied, told the committee—

> Those who are lamenting the orders of the Court requiring the film companies to divorce themselves from their theaters should pause and reflect upon (a) the intolerable conditions of favoritism toward the affiliated theaters and discrimination against the independents which prevailed prior to those orders, and (b) the remoteness and improbability of any casual relationship between theater divorcement and the current film shortage.[16]

[14] U. S. v. *Loew's Inc., et al.*, 85 F. Supp. 881 (1949).
[15] Harry Brandt, hearings, op. cit., p. 259.
[16] Hearings, op. cit., p. 275.

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Unfortunately, it is difficult, if not impossible, accurately to determine the economic effects of the Paramount judgments because television came into prominence at precisely the same time as divorcement and the enjoining of certain trade practices. For this reason, the committee discounts the contentions made that if it were not for "interference" of the courts, the small, independent theater owners would be much better off at this time.

(C) ARBITRATION

The arbitration of disputes arising between distributors and exhibitors has been the topic of much discussion for a good many years. In 1940, the consent decree entered against the five majors contained a provision for arbitration to be administered by the American Arbitration Association which was to be available to all exhibitors. The district court, in its 1946 decision in the Paramount case, stated that arbitration had proven useful, and in regard to disputes as to clearances and runs, had worked out "with rare efficiency," but the court did not provide for any arbitration system. The Supreme Court agreed with the lower court's opinion that it did not have power to force arbitration, but it did have—

> the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court.[17]

The district court, in its final decree, authorized the defendant distributors—

> to set up an arbitration system * * * which will become effective as soon as it may be organized, upon terms to be settled by the court upon notice to the parties to this action.[18]

In 1952, Mr. Eric Johnston, president of the Motion Picture Association of America, Inc., invited the major exhibitor organizations to meet with the distributors in an effort to work out an arbitration system which would be agreeable to both sides. A series of conferences were held and a draft arbitration plan was developed by a committee made up of exhibitor and distributor representatives. Unfortunately, however, no final agreement was arrived at and the 1952 efforts to set up arbitration ended in failure.[19]

The committee in 1953 concluded that an arbitration system would be of great help in alleviating much of the dissension existing between exhibitors and distributors and that it would also considerably relieve the burden upon the Antitrust Division of the Department of Justice in handling the hundreds of complaints which it received from exhibitors.[20]

In 1954, another attempt was launched toward achieving an acceptable voluntary arbitration system. Eric Johnston, on February

[17] *U. S.* v. *Paramount Pictures, Inc., et al.* (334 U. S. 131, 176).
[18] *U. S.* v. *Loew's Inc., et al.* (Equity No. 87-273, final decree, Feb. 8, 1950).
[19] For a detailed account of this matter see Problems of Independent Motion Picture Exhibitors, Select Committee on Small Business, U. S. Senate, Report No. 835, 83d Cong., 1st sess., 1953, pp. 10-12.
[20] Ibid., pp. 16-18.

10, 1954, on behalf of the 10 major distributors, wrote a letter to the 5 leading exhibitor organizations—Allied States Association of Motion Picture Exhibitors (Allied), Theatre Owners of America (TOA), Independent Theatre Owners Association (ITOA), Metropolitan Motion Picture Theatres Association (MMPTA), and Southern California Theatre Owners Association (SCTOA)—calling for a meeting "to make a fresh endeavor to agree upon a system of arbitration of disputes involving exhibitors and distributors of motion pictures in the United States." In the letter it was pointed out that the distributors wished to "make it clear that they will not be able to agree to arbitrate film rentals and that therefore they do not consider this subject open for discussion." [21]

On May 24, 25, and 26, 1954, a conference was held in New York City for the purpose of discussing arbitration. Attending the conference were representatives of the 10 major distributors and the invited exhibitor organizations with the sole exception of Allied which rejected the invitation on the grounds it could not agree to any plan which "does not provide for the arbitration of film rentals and selling policies on a national and regional basis * * *." [22]

At this conference, it was unanimously decided to appoint a committee made up of distributors and exhibitors which would prepare an arbitration draft. A nine man committee was selected with Herman Levy of TOA acting as counsel for the exhibitors and Adolph Schimel of Universal Pictures as counsel for the distributors. This committee held five meetings in July, during which it was agreed that an entirely new arbitration plan should be developed in keeping with the thinking expressed at the May conference. General understanding was arrived at as to the subjects of arbitration, relief to be granted, factors to be considered by the arbitrators, awarding of damages, conciliation and the special handling of films. The joint committee assigned toHerman Levy and Adolph Schimel the task of actually drafting the plan.

Considerable thought, discussion and effort went into the drafting of the arbitration agreement, including additional meetings of the joint committee to iron out particular differences which arose. On August 1, 1955, the finished product was presented to and unanimously approved by the joint committee.

In brief, the agreement provided that exhibitors could institute arbitration when disputes arose as to clearances, runs, competitive bidding, forcing of pictures and contract violations. Film rental arbitration was not included. A provision was contained which would permit each distributor to designate two pictures a year which would not be covered by the arbitration agreement until such time as they were placed in general distribution. For detailed analysis of the plan see appendix II.

The draft agreement was approved by the board of directors of TOA at its annual convention in October 1955. The distributing companies all approved it. The New York exhibitor group, ITOA, also quickly accepted the plan. It was tabled, however, by the other New York group, MMPTA, and rejected by Southern California TOA. Allied, which took no part in the preparation of the draft, voiced disapproval at its annual convention in November. It specifically objected to (1) there being no provision for arbitration of

[21] Hearings, op. cit., p. 281.
[22] Ibid.

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film rentals, (2) the definition of clearance as being too narrow, and (3) the exclusion of two pictures per distributor per year from the arbitration plan.[23]

(D) WITHDRAWAL OF APPROVAL OF ARBITRATION DRAFT

Following completion and approval of the arbitration draft by the joint committee, the distributor members proposed that it be submitted in person to the Attorney General of the United States on January 17, 1956, by Mitchell Wolfson of TOA and Charles Reagan of Loew's, Inc., together with Herman Levy and Adolph Schimel who had actually drafted the plan. This proposal was communicated to Herman Levy on January 9, 1956. At a dinner meeting on January 11, attended by representatives of TOA and the distributors, TOA stated that while it approved the arbitration plan it did not want to submit it to the Department of Justice prior to the hearings scheduled by the Senate Select Committee on Small Business as such action might be interpreted as an attempt on TOA's part to "whitewash" the distributors. The distributor representatives made it clear at this dinner meeting that they would urge their associates to submit the draft unilaterally if TOA would not agree to a joint presentation.

In a letter of January 16, the distributors wrote to Myron Blank, president of TOA, and informed him they intended to submit the arbitration draft to the Select Committee on Small Business and to the Attorney General prior to the scheduled hearings and once again asked TOA to join with them in the presentation.[24]

Mr. Blank wrote on January 21, 1956, that TOA could not agree to the distributors' proposal for the reasons it gave at the dinner meeting on January 11. The letter went on to say that TOA had polled its directors by phone and that the majority of them favored (1) making "every possible effort to broaden the scope of arbitrability," (2) doing "everything possible to bring more product on the market," (3) action "to stem the tide of ever-increasing film rentals, even to seeking the arbitration of film rentals," and (4) withdrawing "approval, temporarily, of the proposed system of arbitration * * *" [25]

In view of TOA's withdrawal of approval of the arbitration draft, it was not submitted to the Department of Justice as had been planned. The distributor members of the joint arbitration committee did, however, submit a copy of the draft to the committee for its study and consideration.[26]

It is significant to note that 3 days prior to TOA's announcing it was withdrawing its approval of the arbitration draft, a joint meeting was held in Washington, D. C., of the leaders of TOA and Allied. At this meeting it was agreed that TOA would join with Allied in demanding an all-inclusive arbitration system which would include arbitration of film rentals; Allied, in turn, would join with TOA in urging on the Department of Justice and the Senate Select Committee on Small Business that the divorced theater circuits be permitted to produce and distribute motion pictures with preemptive rights for the theaters they presently own.

[23] Ibid, p. 28.
[24] Ibid, exhibit 21 (c), p. 230.
[25] Ibid., exhibit 21 (d), p. 231.
[26] Ibid., exhibit 21 (a), p. 216 ff.

Distributors have charged that TOA's withdrawal of approval of the arbitration plan was a "betrayal—deliberate and shameless." [27]

Without attempting to judge the motives of any of the parties to this dispute, the Committee must state that it regrets the withdrawal of TOA as it feels very strongly this plan would have been an important step towards alleviating many of the problems which are plaguing the industry and creating animosity between distributors and exhibitors.

It is difficult for the committee to reconcile the explanation of Herman Levy of TOA that the draft "was not broad enough * * * (and) did not meet the current situation," [28] with his organization's acceptance of it only last year and Mr. Levy's statement:

> In retrospect it is now clear to me that there was little possibility of a broader scope of arbitrability being arrived at than was. [29]

Avoiding discussion of the merits or demerits of the arbitration plan at this point, the committee does feel that the distributors have legitimate grounds for complaint so far as the action of TOA is concerned. In reviewing the many months of work and effort which went into creation of the plan and the apparent success of such efforts in 1955, the sudden turn of events is cause for genuine disappointment.

III. Résumé of Testimony

(A) Exhibitors' Presentation

As a result of numerous complaints received by the committee from exhibitors throughout the country relating the difficulties they have been facing, it was agreed to again hold hearings to determine what had occurred in the industry in the 3 years since the committee's study of 1953. The hearings began on March 21 when Abram F. Myers, chairman of the board and general counsel of Allied, appeared to present his organization's case.[30] Mr. Myers' main complaints pertained to a shortage of feature pictures and increased film rentals which made it difficult for the small independent exhibitors to survive. The position of Allied was summarized by Mr. Myers who stated:

> Consequently we ask the committee in weighing these complaints of excessive film rentals to bear in mind these points:
>
> 1. The film companies have deliberately curtailed their respective outputs to the point where exhibitors must license all or nearly all the pictures released—especially the good ones—in order to operate.
>
> 2. The film rentals demanded for topnotch pictures are often so excessive that many independent exhibitors must forego them altogether or else play them at a loss.
>
> 3. The film companies' current policy of fewer pictures to be played in fewer theaters at high admission prices has enabled them to attain a high degree of opulence while the independent exhibitors teeter on the brink of ruin.
>
> 4. Millions of Americans who are dependent upon the independent subsequent-run and small-town theaters for

[27] Ibid., p. 204.
[28] Ibid., p. 204.
[29] Ibid., p. 203.
[30] Hearings, op. cit., p. 2 ff.

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> motion-picture entertainment are being deprived of the opportunity to see many of the best pictures, in derogation of the public interest.

Mr. Myers claimed there is an annual deficiency of 150 feature pictures a year; the main reason for this shortage is that film companies "are obsessed with the idea that they can make more money by supplying a few pictures to the big key city theaters for exhibition on extended engagements at high admission prices than by producing a lot of pictures to play shorter runs in a large number of theaters at normal admission prices." A second explanation for the film shortage, according to Mr. Myers, is that many foreign countries have restrictions on the number of American films which can be imported and American film companies have "curtailed their output to conform to foreign-quota restrictions, and the American exhibitors are the victims."

Concerning film rentals, Mr. Myers said distributors are in many cases demanding the same percentage of gross receipts of the smaller independent theaters as they do of the large, high-grossing, first-run theaters. It is common today to pay as high as 40 or 50 percent of the gross even in subsequent-run houses, Mr. Myers stated.

The Antitrust Division of the Department of Justice was criticized by Mr. Myers who asserted:

> As regards the 1953 subcommittee's recommendation for a more forceful and diligent policy on the part of the Antitrust Division in assuring compliance with the decrees in the Paramount case, it is our view that the recommendation was disregarded. If there has been any change in the Division's attitude since the date of the report, it has been in the direction of a more lenient and indulgent attitude toward the defendants in that case.

In particular, the Antitrust Division was charged with being negligent in enforcing that section of the consent judgments which enjoins the divorced circuits from acquiring additional theaters unless it is shown to the court's satisfaction that such acquisition would not unduly restrain competition. Mr. Myers stated that the Antitrust Division did not notify affected independent exhibitors or give them an opportunity to defend their interest when application had been made by divorced circuits for permission to acquire additional theaters.

Criticism was also leveled at the Antitrust Division by Mr. Myers because it did not believe that prereleasing or special handling of pictures at advanced admission prices was in violation of the price-fixing and clearance provisions of the consent judgments.

Mr. Myers told the committee that because of the shortage of films and the high rentals being charged independent exhibitors, Allied feels very strongly that an arbitration agreement must include arbitration of film rentals. In reply to a question by the chairman, Mr. Myers stated categorically that an arbitration system which did not provide for film rentals would not be acceptable.

In the absence of agreement as to arbitration of film rentals, Mr. Myers told the committee that the Government itself would have to assume the role of arbitrator. He suggested that serious consideration be given to a bill drafted by Allied which provides that "fair and

reasonable" film rentals be determined by the Federal Trade Commission which would have the power to enforce its determinations against distributors.[31]

Appearing before the committee on behalf of Allied and TOA in regard to arbitration of film rentals was Prof. Wesley A. Sturges, professor of law at Yale University Law School and formerly dean of that institution, who is currently on leave of absence at the University of Miami Law School.[32]

Professor Sturges, who has devoted a great deal of time to the field of arbitration, told the committee that he knew "of no inherent difficulty, so far as the arbitral process is concerned, of arbitrating the reasonableness of film rental." It was his opinion that arbitration of film rental would not be in violation of the antitrust laws nor the existing decrees in the Paramount case. In answer to the chairman's question as to whether there was any precedent for arbitration of film rentals, Professor Sturges stated that there was none that he was aware of.

Trueman T. Rembusch, former president of Allied, testified that in his opinion "approximately 60 percent of the decline in the theaters' box office and attendance could have been avoided had sufficient pictures been available to theaters so that a wide choice of selection of pictures could have been offered to theater patrons." [33] He charged that the decrease in the number of films being produced and released by motion-picture companies was a deliberate plot calculated to give them a greater bargaining advantage over exhibitors. Mr. Rembusch quoted from an article in This Week magazine, issue of January 8, 1956, entitled "Hollywood's Jolliest Year" which stated:

> Studios will continue to cut the number of pictures. Already empty sound stages are being turned over to the production of films for TV * * *.
>
> The secret of Hollywood's optimism lies in its discovery that it pays to make fewer and better pictures. A shortage of films has created a sellers' market. A picture that used to run in a theater for a week or two, may now be booked from 3 to 6 weeks.

It was asserted by Mr. Rembusch that the film companies are endeavoring to change the industry "from a mass to a class-entertainment medium" in accord with the expressed philosophy of Samuel Goldwyn that, "Fewer pictures and fewer theaters will make a greater motion-picture industry."

To document his charges, Mr. Rembusch furnished the committee with a list of the 150 movies which have grossed $4 million or more.[34] This list shows that 43 of these 150 films were played in 1954 and 1955 alone; a period when box-office receipts were off and theater attendance was dropping steadily.

Mr. Rembusch asserted that film companies have increased their share of box-office receipts from 27 percent in 1947 to more than 33 percent in 1955, and while the number of pictures released during this period dropped by more than a hundred a year, film rentals fell off only $30.4 million—from $455.9 to $425.5.

[31] Hearings, op. cit., appendix II, p. 484ff.
[32] Ibid., p. 64 ff.
[33] Ibid., p. 66 ff.
[34] Ibid., exhibit 11, p. 75 ff.

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He charged distributors with being guilty of illegal practices; namely the fixing of admission prices and unreasonable clearances. In reference to price fixing, Mr. Rembusch said:

> The exhibitor who won't raise his admission prices on pictures is known to distributors in his exchange area. That exhibitor, on prerelease pictures, is a marked man and is not offered the picture. If he approaches the distributor representative, asking to buy the prerelease picture, the exhibitor is given evasive answers as to terms * * *. However, the salesman always has one bit of information available, that is, how much admission thus-and-so theater is going to charge for the picture. That information he always has * * *.
>
> Some brash salesmen have told exhibitors, "Unless you increase your admission price you won't get the picture." So, whether by the direct method or indirect method, distributors are illegally fixing admission prices.

On the matter of clearances Mr. Rembusch told the committee:

> The second illegal practice going hand in hand with the prerelease "gimmick" is the increasing of or creating of new clearances or unreasonable waiting periods between theaters not in substantial competition and theaters in substantial competition. The prerelease clearance practice is particularly harmful to those theaters which have not been subject to clearance, for since the advent of television the grossing potential—and this is important Mr. Chairman—of a picture drops off very rapidly 6 weeks after the first-run opening of the picture in the particular territory. The prerelease "gimmick" forces smalltown theaters to play the picture many months after the picture plays first run in their territory. This is accomplished by the distributor arbitrarily selecting a few preferred theaters for exhibition of the picture.

The production of pictures in film sizes other than standard 35 millimeter, such as Paramount's Vista Vision in 55 millimeter, and Twentieth Century-Fox's Cinema-Scope in 55 millimeter, according to Mr. Rembusch have but one purpose, "to completely and finally bring the theaters of the Nation under the complete control of production and distribution." The film companies, by making pictures which require special projection equipment, place an impossible burden upon the smaller theaters which cannot afford such added expense and it is "only the large theaters, which usually play only 1 or 2 companies' products (which), could afford to install any of these trick millimeter systems and expect to make a profit." Although pictures made in larger film sizes have so far been made available in standard 35 millimeter prints, it is Mr. Rembusch's contention that the film companies intend to stop making 35 millimeter prints available to smaller exhibitors and thereby freeze them out of the market.

In conclusion, Mr. Rembusch (1) reiterated Mr. Myers' charge that the Department of Justice has been derelict in its enforcement of the Paramount judgments in regard to price fixing and unreasonable clearances; (2) called for legislation to give the Government power to regulate film rental; (3) urged amendment of the income-tax laws so as to make punitive damages tax free to antitrust plaintiffs; (4) recom-

mended that the divorced circuits be permitted to produce and distribute pictures with preemptive rights to show them first at their own houses; and (5) suggested the committee consider the feasibility of subsidizing American producers who are producing pictures in excess of the number being absorbed by foreign nations under their quota systems.

The strongest plea made for Federal regulation of film rental prices was by Benjamin N. Berger, president of North Central Allied and director of national Allied.[35] He told the committee such regulation is necessary because "the selling policies and practices of the major film companies are preventing thousands of theaters from showing many of the finest motion pictures and are preventing millions of Americans, especially in the low-income brackets, from seeing those pictures." The prohibitive terms which the distributors demand for their better pictures make it impossible for many of the smaller theaters to buy them and as a result attendance has dropped off drastically with many exhibitors being forced to close.

Mr. Berger said there is a definite public interest in keeping theaters open and providing to all the people the opportunity to see decent movies regardless of where they may live or their economic status. The restrictive policies of the film companies are changing the movies from mass to class entertainment with fewer pictures to be shown in fewer theaters at higher prices. In emphasizing this point, Mr. Berger said:

> To get down to cases, the people who are accustomed only to attending the big city first-run theaters and paying an admission of a dollar or more, may not realize that there are hundreds of small-town and subsequent-run theaters throughout the country which have adult admission prices of from 25 to 50 cents for double features. These theaters are patronized by low-wage earners, schoolchildren, pensioners, and the unemployed. These people do not go to Florida in the winter nor do they belong to golf clubs. Their main reliance for amusement and recreation is the motion picture. Our Government should see to it that these people are not deprived of their right to see the top nationally publicized pictures.

Summing up his plea for legislation Mr. Berger stated:

> Speaking in behalf of several hundred theaters in Minnesota, North and South Dakota, and western Wisconsin, I earnestly hope that the honorable committee, as a result of these hearings, will recommend the enactment of appropriate legislation which will enable every theater owner in the land to insure his patrons the right to see all the top pictures at prices they can afford to pay.
>
> If at first blush this smacks of confiscation of property, please be assured that I would be the last to make any such proposal. What I propose, if embodied in appropriate legislation, would in the long run be beneficial to the film companies in that it would enable them to obtain revenue from theaters which cannot now play their products. It would be beneficial to the theaters because it would enable them to

[35] Ibid., p. 90 ff.

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> exhibit the pictures which the public wants to see, and it would be beneficial to the public because large masses are now deprived of the right to see the best motion pictures.

Julius Gordon, theater owner from Beaumont, Tex., and an active member of Allied, in a strong plea for arbitration of film rentals, told the committee of the conditions under which the movie industry operates in foreign countries.[36] He contended that American film companies sell their pictures cheaper in other nations than they do here in the United States. Many countries have regulation of the industry and have set scales which a distributor can charge for a picture. Mr. Gordon stated that if an arbitration system can be agreed upon which would provide for film rentals "based upon an exhibitor's ability to pay," there would be little need for Government regulation of the industry.

In reference to the quota systems imposed by many foreign countries on importation of American films, Mr. Gordon said the American film industry has set its production output to meet the foreign quota restrictions with the result being that there is a scarcity of films in our own country.

Ruben Shor, president of Allied, devoted much of his testimony to what he called unfair practices of the film companies.[37] In particular, he referred to (1) price-fixing operations whereby exhibitors are forced to raise admission prices due to pressure by distributors; (2) discrimination in the licensing of pictures in favor of the divorced circuits; and (3) the unduly long period of time which elapses before films are available to subsequent-run houses.

On this latter point Mr. Shor told the committee:

> These major film companies, moreover, are robbing the word "availability" of all the meaning it ever had in this business. By encouraging and even insisting upon extended runs in the key theaters they are running the suburban and smalltown theaters out of business. All experience proves that the value of a picture depends largely upon its freshness. This policy not only reduces the number of pictures for the subsequent-run theaters but seriously impairs the value of such pictures as they can license because of the long time they must wait before the pictures become available to them.

Mr. Shor urged the committee: (1) To "make a comprehensive report setting forth in detail the policies and practices which have placed such intolerable burdens on the exhibitors and voicing such condemnation thereof as the committee considers they deserve"; (2) To "recommend to the film companies that they voluntarily abandon such policies and practices to the end that the ruthless extermination of independent exhibitors may be halted"; (3) To recommend arbitration of film rentals; (4) To recommend to the Attorney General that the divorced circuits be permitted to produce and distribute pictures; (5) To once again urge the Department of Justice to more forcefully oversee compliance with the Paramount decrees; and (6) To recommend legislation to regulate film rentals if the film companies do not give prompt assurance they will arbitrate film rentals and put an end to their "unfair" policies.

[36] Ibid., p. 101ff.
[37] Ibid., p. 155 ff.

Myron M. Blank, president of TOA, the largest exhibitor organization, composed of independent theater owners and some of the divorced circuits, reiterated previous exhibitors' testimony that because of a decrease in the number of pictures being produced there exists a sellers' market resulting in higher film rentals.[38] He told the committee:

> The plight of the exhibitor today is this: He must either subject himself to the whims and to the unreasonable demands of the producers and distributors or he must close his doors. That is no exaggeration. The distributors know this and are playing it for all it is worth.

Because of this shortage of pictures and the increase in film rentals, TOA and Allied joined together this year in calling for arbitration of film rentals and production and distribution of films by the divorced circuits, Mr. Blank stated. Such a program would keep more theaters in business; pictures would not play off so fast as exhibitors will be able to choose their runs based on their ability to pay; many lawsuits would be eliminated; pictures would be played when they could produce the most revenue; and more theaters would show each picture.

The committee questioned Mr. Blank at some length as to whether allowing the divorced circuits to produce and distribute films with preemptive rights would not place them in a unique position and involve certain dangers to small exhibitors. He answered by stating that it must be kept in mind that the divorced circuits are operating under consent decrees and that the Department of Justice would be in a position to act if they were not operating in a fair manner.

Robert J. O'Donnell, appearing before the committee on behalf of the Council of Motion Picture Organizations, urged repeal of the Federal admission tax to help alleviate the economic plight of exhibitors.[39] He stated that of the 19,200 theaters in the Nation, there are 5,200 operating at a loss and 5,700 more which are doing little more than breaking even. Last year, theater admission taxes to the Federal Government amounted to $80 million and this sum of money could very well mean the difference between continuing in business or closing out to more than 10,000 exhibitors.

Herman M. Levy, general counsel of TOA, devoted his testimony to the issue of arbitration.[40] As the person who represented exhibitors in the drafting of the ill-fated 1955 arbitration plan, he said "it was entirely too narrow for the system to be used enough by exhibitors to warrant the tremendous cost involved," and that when TOA's board of directors approved the draft last October they did so "reluctantly."

TOA is prepared, Mr. Levy said, to once again sit down with distributor representatives joined by Allied to try and establish an arbitration system which is broader and which "will include arbitration of film rentals."

The committee queried Mr. Levy as to trade reports that TOA made a "deal" with Allied whereby TOA agreed to withdraw its approval of the arbitration draft in return for Allied supporting TOA's request that divorced circuits be permitted to produce and

[38] Ibid., p. 184 ff.
[39] Ibid., p. 201 ff.
[40] Ibid., p. 202 ff.

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distribute pictures. Mr. Levy denied emphatically that any "deal" was entered into between the two major exhibitor organizations.

George Kerasotes, vice president of TOA, in his testimony, emphasized the point that "reduction of film production in the United States is, basically, the primary reason why theater grosses are declining here." [41] Along with a product shortage the exhibitor is faced with higher film rentals. He stated that the sliding scale—film rental based on a percentage of the gross which fluctuates according to box office receipts—was used in the industry for many years but has now been generally discarded in favor of flat rentals or flat percentage deals. Mr. Kerasotes told the committee he believes "that the sliding scale is one of the most equitable methods of settling our disputes about film rentals."

Southern California Theatre Owners Association, in a written statement [42] to the committee, declared that (1) distributors are engaging in price fixing when they demand that exhibitors, in bidding for pictures, tell what they intend to charge at the box office; (2) competitive bidding is being used in many cases by distributors to raise rental prices, bidding should be according to specific rules with disclosure of the winning bid to assure good-faith dealing; (3) the divorced circuits should be permitted to produce their own pictures in order to help alleviate the film shortage; (4) arbitration can be beneficial to the industry, but the 1955 draft fails to meet the present needs of exhibitors and is therefore not acceptable; and (5) a Fair Trade Practices Commission should be established by the Congress to adopt and administer "rules of fair competition" with the power to enforce them. Southern California TOA contends that such a Commission "will restore and assure in the motion-picture industry equal opportunity to all to compete under the American system of rules and regulations openly arrived at, openly administered, and applicable to all without discrimination."

Harry Brandt, president of ITOA, which represents exhibitors in the New York metropolitan area, spoke most vigorously in opposition to the proposal of Allied for legislation to regulate film rentals.[43] He told the committee:

> The ITOA, therefore, strongly urges this committee to do everything in its power to discourage the Allied attempts to achieve Government regulation and declare that Federal control of film rentals is an improper solution of exhibitor grievances against distribution.

Mr. Brandt urged the committee to recommend establishment of an arbitration system, without arbitration of film rentals as demanded by Allied and TOA. ITOA is the sole exhibitor group which is presently in favor the draft plan worked out last year.

He called for repeal of the Federal admission tax and suggested that the Small Business Administration change its current rules so that theater owners are eligible for loans to make improvements upon their property, buy newer sound and projection equipment, and have adequate working capital. The committee was also asked to favorably consider divorced circuits being permitted to produce pictures.

[41] Ibid., p. 208 ff.
[42] Ibid., p. 213 ff.
[43] Ibid., p. 233 ff.

Mr. Brandt deplored divorcement which resulted from the Paramount case and also the abolishment of block booking which at least assured exhibitors of a steady supply of pictures.

(B) DISTRIBUTORS' PRESENTATION

Adolph Schimel, vice president, secretary and general counsel of Universal Pictures, as the first witness on behalf of distributors, presented a comprehensive statement which dealt with the issue of arbitration and also strongly opposed Federal legislation to regulate film rentals.[44]

Having been counsel for the distributors in the actual drafting of the arbitration system, Mr. Schimel gave a chronological account of the steps taken to work out such a plan, beginning with Eric Johnston's invitation of February 10, 1954, the joint committee conferences, actual drafting of the agreement and acceptance of it by the joint committee, its approval by distributors and TOA and, finally, the January 21, 1956 withdrawal by TOA.

Commenting upon TOA's withdrawing its acceptance of the draft, Mr. Schimel said:

> There has been a betrayal, deliberate and shameless, not of the distributors alone but of the recommendation of this committee in 1953; there has been a betrayal of the May 1954 conference; of the 18 months' efforts and labors of the joint committee appointed by the conference, and above all of the thousands of exhibitors of this country. Arbitration, its inexpensive, expeditious machinery, as provided in the agreement could only have been for the good of all the industry. Certainly, just as this committee said in its report, many controversies and claims and difficulties could have been solved. The 12 months' trial period would have served to demonstrate the effectiveness of the arbitration and conciliation. Experience would have demonstrated what modifications were warranted.
>
> But arbitration and conciliation was not given a chance to prove itself. There can be no justification for what has taken place.

On the subject of arbitration of film rentals, Mr. Schimel made it quite clear to the committee that the film companies are most vigorously opposed to any such proposition:

> The proposal strikes at the very heart of the business of producing and distributing pictures. Reduced to its simplest terms, the producers, which in every instance but one are publicly owned companies, with thousands of stockholders, are called upon to risk the expenditure of millions of dollars for their product and asked to delegate the fixing of the prices which they are to receive for their merchandise to the inadequately informed, even though well-intentioned, judgment of arbitrators.
>
> The board of directors and the management of the producer are asked to abdicate the power to decide what prices they are to receive from their pictures.

[44] Ibid., p. 280 ff.

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> It is no exaggeration to say that the delegation of far less consequential powers by officers and directors of a company are and have been adjudicated to be ultra vires, that is, beyond the authority and power of the officers and directors to do.
>
> This abdication of decision on price necessarily involves a complete disruption of the producer's business. The impossibility of estimating income can only sterilize the planning, budgeting and completion of production of motion pictures.
>
> Nowhere in American industry can a parallel for this suggestion be found. It would be inconceivable to believe that such a proposal would be countenanced in regard to clothing, food, drugs, which are necessities, or television sets or automobiles, which to some extent are luxuries.

Mr. Schimel also pointed out "the staggering problem" which would arise in "the determination of the yardstick of the film rental to be paid," as well as "the utter chaos in this business if a fraction of the theaters were to seek a modification of film-rental terms after each picture has played."

In regard to regulation of film rentals by Federal legislation as proposed by Allied, Mr. Schimel condemned it as involved and time consuming. He told the committee:

> If there were a designed and avowed purpose to utterly destroy an important industry which relies so much on the creative talents of human beings and not at all on molds, dies and factory production, I know of no surer way to do so than to enact legislation to regulate it, particularly if, as we have every reason to believe and expect, that legislation is drafted in the American spirit, which is to be fair and equitable to all concerned.

Y. Frank Freeman, vice president of Paramount Pictures and in charge of studio operations in Hollywood, in answering exhibitors' charges of increased film rentals, told the committee of the steep rise in production costs in recent years.

Placing the major blame for drop in theater attendance on television, Mr. Freeman said that it is necessary to make better pictures today in order to attract people to the movies.[45]

> The public will no longer buy tickets at the theater, except to see the very highest form of entertainment, far superior to what they can see on television free. For this type of entertainment they will pay an admission price. For anything less, they will not.

To make a picture today which will draw well at the box office it is necessary to spend a large amount of money to acquire good stories, actors, directors, writers, and producers, Mr. Freeman said. He told the committee that "it costs the industry $50 million more to make 225 less pictures now as compared with 15 years ago." The average negative cost of pictures made by Paramount has more than doubled in the past 10 years and the Cecil B. DeMille spectacular, The Ten

[45] Ibid., p. 347 ff.

Commandments, will cost more than $12 million when finished this year.

Commenting on exhibitor complaints as to a film shortage, Mr. Freeman said:

> In conclusion I wish to state that Paramount is as anxious as the exhibitors to make as many pictures as possible, provided the pictures are of the caliber that the public will buy. However, we are not interested in making pictures solely for the sake of making numbers. Paramount is making fewer pictures because it believes that it can make greater pictures if it makes fewer, under the existing conditions. When the conditions in the industry are such that Paramount can make a greater number of pictures, pictures that the public will buy, we will certainly be happy to make them.

Charles M. Reagan, vice president and general sales manager of Loew's, testified that "the charge that Loew's has prospered at the expense of the exhibitor is absolutely without foundation."[46] He stated that his company has been losing money since 1947 on its film rentals from theaters in the United States and Canada and "with the inclusion of foreign income, our business for the year 1955 showed a profit, before taxes, of $2,866,000 on gross rentals of $103,688,800, or a return of 2½ percent," which "presents an earning ratio which is probably lower than any other major industry in this country and quite contrary to that presented by the exhibitors at these hearings." The 1955 profits of Loew's, after taxes, of $5,312,000 included, in addition to film rentals, profits from its theater holdings as well as profits from its record and music companies, Mr. Reagan explained.

He told the committee that the cost of producing pictures is going up steadily while domestic film rentals are diminishing due to a falling off of theater attendance. High production costs are necessitated to "induce the patrons to leave their homes and pay admission prices at the theater box offices." He stated that because the cost of making pictures is so high the risks are great:

> We are presented with a most difficult problem when we undertake the production of a picture which will not be released for many months after production begins since its measure of public acceptance is not yet known. This risk, now increased greatly by changes in public tastes, and made still greater by increased costs and unusual expenses of experimentation, limits even our boldest attempts to make more motion pictures. In the past, the failure of a picture costing $2 million or $3 million might be offset by public acceptance of a number of less costly productions. Today, outstanding pictures for the most part are very expensive productions and if for unforseeable reasons one or two do not meet the final test of public acceptance, the success of a whole year's production effort can be seriously affected.

Referring to the picture Guys and Dolls which was the topic of so much criticism by exhibitors who claimed the rental terms were exorbitant and that they were pressured into raising their admission prices, Mr. Reagan said that Sam Goldwyn "had a legal and moral right" to

[46] Ibid., p. 361 ff.

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demand the terms he did. He said Guys and Dolls which MGM distributed was of such high caliber as to entitle it to terms demanded on "many other pictures which are not as costly or as appealing and acceptable to the public." Mr. Reagan did not, however, indicate what other pictures were rented at terms as high as 90–10 less expenses, which was the case for Guys and Dolls. As to alleged price fixing, he termed this charge "obviously without merit" as it is the exhibitor who "in the final analysis" determines what price he will charge. Mr. Reagan did admit, however, in answer to committee questioning, that MGM "might try and persuade the exhibitor to increase his admission price to a point beyond that which he normally charges."

Abraham Montague, vice president and director of Columbia Pictures, reiterated prior distributors' testimony that with television competition the film companies have had to produce better and more costly pictures to entice patrons to the theaters.[47] He told the committee that his company, prior to television, did a thriving business on low-cost films such as westerns and mysteries, but such pictures no longer have box-office appeal and as a result they have been dropped altogether in favor of the so-called big pictures such as Cain Mutiny, Picnic, On the Waterfront, and From Here to Eternity, which cost millions to produce and distribute.

Mr. Montague very candidly attributed the major share of the exhibitors' current dilemma to the growth of television and drive-in theaters. He told the committee:

> It is axiomatic in our business that both these forces have made survival of marginal theaters extremely difficult and, in an unfortunate number of instances, impossible. Much as we may regret the dislocations and hardships which have resulted from them, I see nothing insidious in the rise and development of new entertainment media which have the acceptance and approval of the public who, in the final analysis, alone determine how and where they are going to spend their amusement dollars. These developments it seems to me, are nothing more than an expression of technological change and progress through which our country derives so much of its leadership and strength.

Arnold Picker, vice president in charge of foreign distribution for United Artists, testified as to the importance of the foreign film market to American film companies and also of the conditions under which the industry operates in these foreign lands.[48] Our Nation's film companies are doing business in more than 70 countries and realize a gross revenue of between $275 million and $300 million annually with more than $100 million coming back to the United States each year. The foreign market accounts for 40 to 50 percent of the business done today. Mr. Picker emphasized the importance of this market by saying:

> I know of no industry so dependent on the overseas market for its welfare and health. This industry spends in the neighborhood of $300 million a year to make its product, and if you remove or eliminate approximately one-third of the net income with which to make these films, it is quite obvious

[47] Ibid., p. 375 ff.
[48] Ibid., p. 400 ff.

> that the industry would soon face insolvency and bankruptcy or would have to change its method of production in such a way that the type and nature of its films would radically change. The important, costly, and attractive pictures could not be made because the income would not be available to make them.

Taking issue with Julius Gordon's testimony that foreign countries, for the most part, regulate film rentals, Mr. Picker stated:

> These regulations, where they do exist in one form or another, are there to protect and foster a national motion-picture industry in its entirety. Invariably, I believe that this protection is essentially designed to build up and strengthen a local production industry, which these countries consider vital as a form of national expression * * *.
>
> I am reasonably certain that if Mr. Gordon were to be asked to do business under the conditions which exist in these various territories he would fight like a tiger against them, because the operation of the industry would be so hamstrung that it would be impossible to operate it in the American tradition of free enterprise.

Admitting that "practically all of the northern countries of Europe had or have one form or another of film-rental restriction," Mr. Picker said this was because "of some sort of guild system or to protect the outflow of foreign exchange." He pointed out that where regulations as to rentals, quotas and the like do exist almost inevitably "the local industry is in economic difficulty," while in those countries where there is little or no regulation it is found that there is "a markedly greater degree of stability and vigor."

Louis Phillips, vice president and general counsel of Paramount Pictures, told the committee that although distributors regret the large number of theater closings, it is not their fault.[49] He attributed many theater closings to (1) the growth of drive-ins, (2) television, (3) population shifts, (4) unemployment in certain areas, and (5) obsolete marginal theaters.

In voicing opposition to arbitration of film rentals, Mr. Phillips said that "no conscientious and responsible executive of any producer or distributor company could with propriety consent to arbitrate film rentals or sales policies," and that he knew "of no other industry where the buyers have had the effrontery to make such an unsound, unbusinesslike demand."

The proposal of TOA and Allied that the divorced theater circuits be allowed to produce their own pictures with preemptive rights was termed by Mr. Phillips as "unfair, if not wicked" in view of the fact that producers would not be permitted at the same time to operate theaters, thereby giving the circuits a distinct advantage.

Mr. Phillips denounced Federal legislation to regulate film rentals as suggested by Allied as "fantastic" and "impractical."

Commenting on exhibitor complaints as to lack of a system of releasing pictures to established runs in an orderly manner with reasonable clearances, Mr. Phillips contended that certain pictures, due to their tremendous cost, require special handling by distributors in

[49] Ibid., p. 423 ff.

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order to return sufficient money to make a profit possible. In defense of this policy he told the committee:

> If we were to follow routine methods of distributing our pictures we could not get our money back for these expensive pictures. Using ordinary methods of exploitation the pictures would be rushed through distribution and play the shortest period at each theater. The public would not then have an opportunity to see them in sufficient numbers to pay back our cost * * *
>
> We feel that only in the individual way we handle our pictures can we hope to realize the revenue necessary to make possible the production of pictures which the public will acclaim by their patronage and from which exhibitors will make a profit.

William C. Gehring, vice president of Twentieth Century-Fox, testified in regard to the charge of exhibitor witness Trueman Rembusch that there was a "battle of the millimeters" which had for its purpose eradicating thousands of small theater owners in the country.[50]

He told the committee that the improvements which have been made in motion picture exhibition are a direct result of television competition. The film companies realized that if they hoped to be able to compete, they had to improve their product and the result has been Cinerama, CinemaScope, Vista Vision and similar ideas. CinemaScope, which was developed by Twentieth Century-Fox, has been a tremendous success with almost all theaters in the country having installed it.

Mr. Gehring stated that any of the new process films can be used on the CinemaScope equipement and in the case of pictures such as Carousel produced in 55 mm., "squeeze prints" are made so they may be shown on standard projectors.

The final distributor witness, Charles J. Feldman, vice president and general sales manager of Universal Pictures, in his written statement, asserted that a greater number of pictures will not solve the exhibitors' problems and that the only way to attract patrons to the theater is with quality pictures.[51] "How foolish for our company not to make more pictures if we thought there was a chance to profit," he stated.

Mr. Feldman said that anyone who wants to can make pictures; it requires no license. Many investors in this country would be making pictures today, if they thought there was any money in it. He emphasized, however, that he did not favor allowing the divorced circuits to produce movies with preemptive rights as proposed by TOA and Allied.

(C) STATEMENT OF THE DEPARTMENT OF JUSTICE

Exhibitors charged that the Antitrust Division of the Department of Justice has been lax in its enforcement of the Paramount judgments. Specific allegations were presented the committee as to fixing of admission prices, forcing of pictures upon exhibitors, unreasonable and unlawful clearances and the improper acquisitions of theaters by the divorced circuits. The committee requested the Antitrust Di-

[50] Ibid., p. 467 ff.
[51] Ibid., p. 471 ff.

vision to answer those charges and also to give its opinion as to the effect of the consent judgments—particularly the effect on the independent exhibitors.

In a comprehensive report, submitted to the committee by Assistant Attorney General Stanley N. Barnes, it was stated that the Paramount case resulted in the granting of equal opportunity to independent exhibitors and this was its basic achievement.[52] The Antitrust Division report stated:

> The important accomplishments of the Paramount case have been to give every exhibitor the same opportunity to license product as that enjoyed by his competitor and to create an open market for the distribution of pictures. In the days before the Paramount case independent exhibitors often found that they could not license pictures and were thereby forced to sell out to the affiliated circuits. If an independent sought out a town which he could pioneer, a circuit not infrequently would come in after he had built up a business, take away his pictures, and then the independent would eventually have to sell out. The affiliated theaters would take away the early runs from the independents. A threat to come in with a new theater would often induce an independent theater owner either to sell out or give the circuit an interest in the theater. These practices were done away with by the Paramount case.
>
> Such practices came about because the circuits enjoyed a preferred access to motion picture product. In addition, the integrated companies enjoyed a preference as distributors in selling their pictures to the integrated companies. First, the pictures of each of the integrated companies automatically went into its own theaters. Secondly, the pictures of each integrated company tended to go into the theaters of the other integrated companies * * *.
>
> Thus restraints not only in the business of exhibiting motion pictures but also in the business of distributing motion pictures resulted. It was the strategic advantage of this vertical integration between producing and distributing companies on the one hand and circuits of substantial size on the other which created a power on the part of the defendants to exclude competition from the distribution and exhibition markets.
>
> The judgments entered in the Paramount case coped with this monopoly power by destroying, through the remedy of divorcement, this interdependency among the defendants on the one hand to obtain pictures for their own theaters and on the other to obtain theater outlets for their own pictures. Furthermore, circuit buying power was negatived by providing for theater-by-theater selling, a provision which we will refer to again. Circuit buying power was further negatived by opening up all closed competitive situations and by requiring the divestiture of theaters in the localities concerned * * *.

The Division pointed out that in 1945 the 5 major film companies had interests in 17.5 percent of the theaters in the United States

[52] Ibid, appendix XIX, p. 735 ff.

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while today, as a result of divorcement and divestiture of more than 1,200 theaters to independent exhibitors, the divorced circuits operate only 7.5 percent of the country's theaters which "is an enormous reduction in the relative position of these circuits." In further reference to the divorced circuits, it stated:

> Because the ability of the formerly affiliated circuits to control product arbitrarily has been eliminated, and because of the licensing injunctions contained in the Paramount judgments, independent exhibitors competing against the circuits have been able to improve their runs, to shorten the clearances competitive theaters take over them, and for the first time to secure competitive opportunities to license product * * *.
>
> To sum up, the judgments entered in the Paramount case took away from the affiliated circuits the control over product which gave them monopoly power, created competition in exhibition by requiring, where competition had been eliminated by such circuits, the divestiture of theaters to reestablish competition and, by giving independent exhibitors the opportunity to compete for product on a par with their competitors, enabled independents to remain in or go into the motion picture business with a fair competitive chance of being successful. It also created a free market for the distribution of pictures. This equality of opportunity given to independent exhibitors and to all distributors is the basic achievement of the Paramount case.

Allied has contended that distributors have engaged in price fixing by demanding in certain competitive bidding situations that exhibitors inform the distributor what admission price they intend to charge, and in many cases distributors refuse to rent a picture on a percentage deal unless admission prices are increased.

The Antitrust Division stated that its views on this point were fully discussed in its letter of November 17, 1953 to the committee, in which it said:

> It is our considered opinion that it does not constitute the fixing of minimum prices for admission by the parties to the license agreement and hence it is a proper method by which to determine the film rental to be paid by an exhibitor to the distributor.

It is in the case of the more desirable films that the question usually arises; because the rental a distributor will obtain has a direct relation to admission prices, the distributor has a legitimate interest in ascertaining what the exhibitor does intend to charge. The distributor, however, cannot require the exhibitor to charge a certain admission as this would be price fixing. The Paramount decrees "did not bar licensing of pictures based on a percentage of box office receipts" and "an exhibitor's admission price has direct bearing on the amount of such receipts," the Division asserted.

Sharp issue was taken by the Division with the assertion of Allied that prereleasing and special handling of pictures involved improper clearance. The Division referred to its letter of 1953, in which it stated that clearance as defined in the Paramount judgments is "the period of time stipulated in license contracts which must elapse be-

tween runs of the same feature within a particular area or in specified theaters." In the absence of any such bilateral agreement, the issue of clearance is not involved.

In defense of special marketing of expensive and unusual pictures, the Division told the committee:

> Usually it is the very expensive picture that is specially marketed. If very expensive pictures cannot be profitably marketed in the ordinary way, they will not be produced if they must be thus marketed * * *. It is not necessarily in the public interest that the Department agree to a construction of the judgments which will bring about a situation in which there is no point in producing an extraordinarily expensive picture because it cannot be profitably marketed. Anything which further reduces the number of pictures produced or their quality will not help exhibitors.

In answer to exhibitor testimony to the effect that distributors oftentimes force pictures on theater owners against their will, the Antitrust Division stated that in the past 3 years it has received only six complaints of such forcing "including at least two instances where it is very doubtful that any reasonable ground for the complaint existed." Prompt remedial action was secured in those cases where complaints were justified and the Division found no evidence in such cases of any calculated policy on the distributors' part.

Mr. Myers of Allied, in his testimony before the committee, said that "the Antitrust Division's disinclination to enforce the decrees is especially discernible in connection with applications of the divorced theater circuits to expand their operations in the exhibition field."

In discussing this charge, the Division noted that it had demanded and obtained in the consent judgments a provision forbidding the divorced circuits to acquire additional theaters until they had divested themselves completely of certain of their theater holdings in closed communities. It pointed out that the district court's decree of February 8, 1950, did not impose such restrictions upon the divorced circuits, but the Division, nevertheless, was successful in imposing them in the consent judgments.

As a result of these restrictions, for a number of years the divorced circuits did not buy or build additional theaters, which was a definite advantage to independent exhibitors, especially in regard to drive-in theaters which have been booming. The Division stated that although there are almost 4,600 drive-ins, the divorced circuits own only a small percentage of them. RKO Theatres and Stanley Warner have no drive-ins, National Theatres has only 2, Loew's Theatres has 4, and American Broadcasting-Paramount Theatres owns "a relatively small number" which it acquired prior to its consent judgment.

Four of the five divorced circuits have now completely divested themselves of the theaters required by the Paramount judgments (the exception being ABC-Paramount) and are therefore eligible to acquire additional theaters so long as each such "acquisition will not unduly restrain competition."

The Division reports that the first such acquisition was by Loew's in February 1955, and to date there have been only 13 additional theaters acquired—5 by Loew's and 8 by National. In every instance but the first acquisition, there has been a court hearing after notice

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in the trade press. In cases where exhibitors wish to present information to the court, they have been afforded such opportunity although exhibitors are not entitled to do so as a matter of right. The Division stated that it did not oppose any of the 13 above-mentioned acquisitions because it did not feel that the facts warranted it.

IV. Dilemma of Motion Picture Exhibitors

(A) ATTENDANCE LOSS

Theater attendance has fallen off steadily from its all-time peak of 82 million patrons a week in 1946 to less than 46 million patrons per week in 1955. These figures are even more startling when it is noted that during this period the total number of adult potential moviegoers rose by 15 million. The outlook for the present year is far from bright with Sindlinger & Co. reporting movie attendance running below 1955. Theater attendance has fallen off for big and small alike with RKO Theatres, for example, showing a drop from 94 million total admissions in 1946 to 38 million in 1955, while its number of theaters was reduced from 84 to 70.[53]

The decrease in theater attendance and the changing pattern in movie-going has been primarily caused by the parallel growth of television and the drive-in movies. It is interesting to note that prior to these two new entertainment mediums, movie attendance normally fell off in the spring and was at its peak during the fall months. Today the situation is exactly reversed with attendance up sharply during the warmer months when all the drive-ins are open and the television summer replacements are on.

Basic reason for falling attendance is not that fewer individuals go to the movies today, but rather that fewer people go frequently to the movies than before. Sindlinger estimates that in 1946, 61 percent of the adult population attended the movies more than once a month while in 1955, this group of frequent moviegoers had dropped to 26 percent.

(B) THEATER GROSS

As a result of the drop in attendance, exhibitors' receipts from sale of tickets has also fallen off. In 1946, admission receipts after taxes amounted to $1.5 billion as compared to only $1.185 billion in 1955, in spite of the fact the average admission cost rose from 35 cents to 50 cents. Net theater gross this year is off drastically with receipts for the first 3 months down by almost 22 percent compared to the same period a year ago. If this should continue for the remainder of the year, it would mean the poorest year since the depression. Sindlinger estimates somewhat of an upsurge during the summer months due to a decline in the quality of television programs, but he still predicts the annual theater gross will be off by more than 16 percent from last year.

In considering box office gross, it is noted that the 26 percent of the adult population which attend the movies more than once a month account for 85 percent of total theater admissions; those who attend movies more than once a week (7 percent of the adult population) provide almost 44 percent of the gross. From these figures it is apparent that the film industry is dependent for its success upon a

[53] Variety, April 18, 1956, p. 3.

relatively small segment of the total population. Approximately 20 million people, according to Sindlinger, account for 75 percent of the theater gross and 65 to 75 percent of this group are young people and dating couples who "go to the movies most often because it's the most inexpensive and wholesome way of spending a night out."

(C) LOSS OF PROFITS

The sharp decline in attendance and admission receipts has resulted in a financial crisis for exhibitors—especially for the small conventional four-wall theater owners who, in most cases, have no other source of income.

In the peak year of 1946, net theater profits before taxes on admissions alone amounted to more than $290 million; by 1953, admission receipts had fallen off so that total theater expenses exceeded admissions by more than $165 million. Since partial tax relief was granted by Congress in 1954, the situation has improved, but Sindlinger estimates that theaters on a consolidated basis are still running in the red by $11.8 million a year, excluding profits realized from concession sales. It should be noted that these figures include drive-ins so that the crisis faced by the four-wall theater owners is, if anything, minimized. Concession sales have increased by better than sixfold since 1946, largely as a result of the growth of drive-ins which do a much larger concession business than do conventional theaters. Today many theaters are able to keep going only because their concession sales make up the losses suffered at the box office.

(D) NUMBER OF THEATERS

Despite the downward trend in theater attendance, the number of theaters in operation has remained quite stable with the closing of four-wall houses being offset by construction of drive-in theaters. (See table I.)

TABLE I

End of year	Active [1] 4-wall theaters	Active [1] drive-in theaters	Active [1] total theaters
1946	18,719	300	19,019
1947	18,059	548	18,607
1948	17,575	820	18,395
1949	17,367	1,203	18,570
1950	16,904	2,202	19,106
1951	16,150	2,830	18,980
1952	15,347	3,276	18,623
1953	14,174	3,791	17,965
1954	15,039	4,062	19,101
1955	14,613	4,587	19,200

[1] An "active theater" may be closed for the season, such as a 4-wall theater at a summer resort or a drive-in which closes from 2 to 5 months of the year; or an "active theater" may be 1 that has a policy of operating for a few days in each week.

Source: Sindlinger & Co.

In analyzing the closing of theaters and construction of drive-ins according to States, there does not appear to be necessarily any direct relationship between the two. The following States which have had the highest percentage of closings—Illinois, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, Ohio, and Rhode Island—have with one exception (Kentucky) been below the national average in

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construction of drive-ins. This is not to say that the phenomenal growth of drive-ins has not had an adverse effect upon four-wall theaters, but it does not appear to be the major reason for many theaters closing.

The phenomenal success of drive-in theaters is attested to by a recent report of Sindlinger & Co. which shows that during the week of June 17 to 23, more people attended drive-ins than four-wall houses for the first time in the history of the industry. Total attendance for the week was 51,657,400 (39,805,400 adults and 11,852,000 children). Drive-ins accounted for 26,274,000 (18,350,000 adults and 7,924,000 children) and 4-wall theaters for 25,383,400 (21,455,400 adults and 3,928,000 children).[54]

(E) DIVORCED CIRCUITS

In 1945 the 5 major film companies had interests in 3,137 theaters throughout the United States. As a result of the judgments in the Paramount case, separate independent companies were set up to take over the divorced circuits. The number of theaters they own has been reduced to approximately 1,400 due to divestment of 1,200 theaters under the consent judgments and the sale of other theaters which were not considered profitmakers.[55] Almost all of the theaters of the divorced circuits are conventional as the judgments prevented the newly formed companies from buying or building drive-ins until they divested themselves of specific theaters in closed situations.

The divorced circuits have not been as hard pressed as have the smaller theaters in the suburbs and small towns for a number of reasons. First of all, most of their theaters are first-run and play pictures for at least a week and often longer. Therefore, they require fewer pictures and can be more selective in choosing films which will have box-office appeal. The local subsequent-run theaters do not have such an advantage as they must play several pictures a week which p aces them in a difficult position. Secondly, the circuits have sufficient financial backing to install the improved projection and sound equipment which makes for greater attendance. Thirdly, the circuits can charge much higher prices than can the local independent theaters because they are showing first-run pictures in most cases.

A study of the financial reports of the divorced circuits indicates that they are realizing a net profit after taxes of from 3 to 4 percent of their gross income which is much better than the independent exhibitors are doing by and large, although far less than the percentage of profits being realized by industry as a whole.

(F) THE ROLE OF TELEVISION

One of the few points upon which distributors and exhibitors seem in agreement is the significance of television in the drop in theater attendance. The growth of television as an entertainment medium has been phenomenal. As of January 1948, there were less than 200,000 television sets and only 17 stations. By January of this year, there were almost 37 million sets in use and 482 stations throughout the Nation. Almost 70 percent of households in the United States have a television set.

[54] Film Daily, June 29, 1956, p .6.
[55] Statement of the Antitrust Division, hearings, op. cit., p. 735 ff.

Sindlinger & Co. reports that during the first 4 years of television's growth (1948–52) in those areas where television reception was good, 23 percent of the theaters closed compared to only 9 percent of the theaters closing in areas where television was not available. Public expenditures for movies in television areas dropped during this period by 40 percent while expenditures in nontelevision areas actually rose by 3 percent. Sindlinger's calculations indicate that theater attendance in an area declines 1 percent for every 2 percent increase in television home ownership until ownership reaches around 68 percent, at which point attendance levels off.

When television enters an area there is a marked change in the pattern of theater attendance, Sindlinger points out. Prior to television, roughly 60 percent of the adults attend the movies more than once a month while this number drops to less than 30 percent when television ownership in an area approaches 70 percent.

According to Sindlinger's study, once an area becomes saturated with television, theater closings come to practically a halt; but during the period in which television is building up in an area, the rate of theater closings is high. He estimates that from 40 to 45 percent of the theaters close in an area by the time a city or State becomes completely saturated with television.

The trade paper Variety in an article headed "Hollywood versus 'Big Night' TV" [56] warns film companies and exhibitors that they can expect even more rugged competition from television as:

> * * * virtually every night of the upcoming TV season will break out with (1) new shows, (2) more hour and 90-minute shows, (3) and programing blocks providing "an evening at home," in addition to the regular fare. New and familiar personalities aside, it's axiomatic that every new program is latched on to by X number of millions of home-grown critics and just plain Joe Blows who want to perch in a box-office seat at the preem without paying the box-office freight. With two dozen such new formats at the very least, each rated at a minimum 12 million customers per showing, that adds up to a monstrous 288 million viewers * * *
>
> In TV's swiftly changing scene, there will still be the fixed spec slots—NBC with its mixed fare every fourth Saturday, Sunday, and Monday, and CBS with its Saturday night Star Jubilee at the same frequency—and the half-hour "bread and butter" programing added to the cluster of full hour dramatics. Saturday night is expected to be strengthened on a regular basis by NBC's shift of Sid Caesar from Monday. As result, there will be 2 hours of the comedy varieties that night, Perry Como from 8 to 9 and Caesar from 9 to 10, followed by the solid Hit Parade. In addition, CBS has set Saturday aside for the new Jeannie Carson series. What can the flickers throw against that lineup?
>
> The cinemas will also have to grapple with new and perhaps weightier values in TV's Tuesday. Herb Shriner will front a 60-minute show at the key hour of 8:30 to 9:30 for CBS, followed by Red Skelton and $64,000 Question. While this is going on, NBC will emerge with 16 Ray Bolger live stanzas at 8 to 9, plus Dinah Shore, Bob Hope, and Martin

[56] Variety, May 9, 1956, p. 7.

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and Lewis to fill out a 40-week span. What Milton Berle did for years against the picture houses will likely continue Tuesday night, a night also earmarked by Kaiser Aluminum for a dramatic series.

If it isn't the weekends and Tuesday, it's Thursday. Next season, CBS comes in with 150 minutes of "an evening at home"—mating the regular Climax and one a month Shower of Stars to a seguing 90 minutes of a brand new Playhouse 90 composed of live and film dramas, running through the key hours from 8:30 to 11 o'clock. That night NBC will likely enter Tennessee Ernie Ford into the nocturnal TV arena.

Of the new live shows, NBC thinks it has something in Buddy Hackett, who under the aegis of spec man Max Liebman and the William Morris agency, will be seen in a half-hour comedy series titled "Stanley" at 8:30. Up ahead, it's kid time via a new telepix cluster, Sir Launcelot, with among other shows geared for moppets on other days being Circus Boy and Adventures of Jim Bowie, NBC and CBS, respectively.

In the quiz sweepstakes, the cinemas will have to fight it out on one night (not yet selected) with the biggest jackpot of them all, the 20 Steps to a Million show that CBS has approved for slotting this spring. (See p. 1 of last week's issue.) A click would give the giant quiz holdover status to next season.

As if this weren't enough of a super headache for the film houses, ABC–TV, on a burgeoning spree, is making a considerable amount of noise with a number of proposed spectaculars and one-shotters added to its Disneyland kill Wednesdays and acquisition of Omnibus for Sunday night berthing. Many of these specs will be in the hour and longer cultural groove.

Mr. Producer and Mr. Exhibitor cannot say that they are not on notice. The foregoing represent only a few of the highlights of TV's 1956–57.

It thus appears that even though an exhibitor has been able to weather the entrance of television, he still has his share of problems in attempting to lure patrons from the comfort of their living room where they can watch more and more high caliber television entertainment.

V. Status of Producers and Distributors

(A) NEW METHOD OF OPERATION

Although the profits of producers and distributors are nowhere near what they were in the lush days of 10 years ago, film companies are still doing very well. As Variety puts it:

> Today the production side of the motion-picture is healthy and promising while the theater operating side is notably depressed * * * Thanks to careful adjustments in their output (which in turn affected the theater b. o.) and to a natural ability to latch on gradually to the television found-

money train, production-distribution today is comparatively healthy, whereas the theaters are crying the blues.[57]

The film companies have discovered that with television in practically every household, the public will not go out to the movies except to see quality pictures. Gone are the days when moviegoers would come in droves to see even the most mediocre pictures. The new philosophy of bigger and better pictures was expressed to the committee by Louis Phillips, counsel of Paramount Pictures, the biggest moneymaker of the past 3 years:

> It is universally recognized in the picture business that the public today is highly selective in the pictures it chooses to patronize. The public shops for its pictures as never before. The great pictures are breaking all records at the box office, whereas average pictures simply do not do the business and are unprofitable.
>
> In view of this high selectivity by the public, Paramount has embarked upon a program of sparing no effort or expense to make pictures of outstanding quality, pictures which will induce the public to attend in unprecedented numbers. We eliminated to the greatest extent possible all so-called B pictures and this accounts for the fewer number of pictures we have made. * * *
>
> We are concentrating on greater pictures and we are spending greater sums than ever before to presell and sell each of our pictures to the public. We are always studying new marketing and merchandising methods so as to attract the greatest patronage for the benefit of our customers and ourselves.[58]

Abraham Montague, vice president of Columbia, told the committee that his company had to stop producing western movies starring actors such as Gene Autry because the public can now see him on television free. Columbia also eliminated its Crime Doctor and Boston Blackie pictures as the public simply would not spend money on such films. The only answer was to make better and more costly pictures such as Picnic, On the Waterfront, From Here to Eternity, and Caine Mutiny, which do well at the box offices.

Proof that the film companies are corrected in their assertion that the big expensive pictures pay off is shown by examining the all-time list of 150 pictures which have grossed more than $4 million [59] on domestic runs. Of these top moneymakers, 43 were shown in 1954 and 1955, and of the top 10 of all time, 7 were released within the last 4 years: The Robe, Greatest Show on Earth, From Here to Eternity, This is Cinerama, White Christmas, Quo Vadis, and Cinerama Holiday.

Emphasis is more and more on the so-called blockbusters. This summer, for example, the public is being offered such fare as Moby Dick, War and Peace, The King and I, Trapeze, The Conqueror, High Society, Eddy Duchin Story, and Away All Boats. These features range in production costs from 2 to more than 5 million dollars each—costs unheard of a few years ago. The public today is being treated

[57] Variety, May 16, 1956, p. 3.
[58] Hearings, op. cit., p. 453.
[59] Hearings, op. cit., exhibit 11, p. 75 ff.

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to the highest quality productions in the history of the industry, thanks in large measure to the effect of television.

(B) RISING COST OF PRODUCTION AND DISTRIBUTION

With Hollywood cutting down on low-budget pictures such as westerns and crime stories and the emphasis being more and more on spectaculars which will catch the public's fancy, the price of making movies has risen astronomically.

Paramount Pictures presented to the committee figures which show that its average negative cost has more than doubled in the last 10 years to more than $2 million, and if The Ten Commandments is included for last year, its average cost goes to more than $3 million.

Warner Bros. testified that 15 years ago all but 3 of its pictures cost less than $1 million each, while during the 1954–55 season only 5 cost less than $1 million, 3 cost more than $1 million, 4 more than $2 million, 3 more than $3 million, and 1 more than $4 million. In the past 2 years the average negative cost of pictures made by Loew's has gone up by more than half a million dollars. Columbia reported that the amount of money it has invested in film inventories has more than doubled since 1951, due largely to more expensive films.

In making "blockbuster" pictures the film companies have to have topflight writers, directors, producers, and stars. They cannot afford to take a chance on unknowns as they could a few years ago when almost any picture would do well at the box office. Hollywood's top talent knows how dependent the industry is for their services and acts accordingly. It is not uncommon for stars to demand and get 10 percent of a picture's gross earnings or to forego a salary and instead take a large part of the profits in order to escape high income taxes. The enticing offers made by television for the services of Hollywood talent have also helped drive the salaries and percentage deals higher. It should also be noted, although film company witnesses did not mention it, that salaries of top movie executives are still large despite the industry's difficulties.[60]

The cost of prints has increased substantially because of more pictures in color and more prints required due to faster playoff of pictures than before. Costs run from $150 to $1,000 per print and the average picture made by the majors requires more than 300 such prints. Paramount Pictures informed the committee that its print costs per picture averaged $76,000 in 1949 and $174,000 in 1955.

The cost of distribution has gone up largely as a result of the Paramount case which prohibited compulsory block-booking and thereby forced distributors to market pictures on an individual basis. This means an increase in man-hours spent in calling upon exhibitors. Abraham Montague, of Columbia, told the committee their salesmen call upon smalltown exhibitors 6 or 7 times a year as compared to only 1 or 2 visits under the old system. He estimated that Columbia branch salesmen travel 2,500,000 miles annually at a cost of more than $1 million to service such accounts which produce only 28 percent of the company's domestic revenue.

In order to assure box-office success for these big expensive pictures, it is necessary to do extensive advertising. Film companies report that their advertising costs have more than doubled in recent years.

[60] Hearings, op. cit., p. 721 ff.

Paramount, for example, had advertising costs per picture in 1949 of $161,000 as compared to $344,000 last year.

Thus, while the number of pictures has gone down in recent years, the cost of moviemaking has been steadily rising. Film companies have discovered there is money to be made in better quality pictures, but they have found out such pictures entail tremendous capital investment.

(C) FILM COMPANY PROFITS

Overall corporation profits in the United States have more than doubled in the past 10 years while film company profits have dropped by more than 65 percent.[61] The low point for producers and distributors was reached in 1953; since then the situation has been slowly improving.

Although film company profits are far from spectacular they are substantial. Basic reasons why they have been able to continue profitable operations while thousands of exhibitors are being forced out of business is because of the increase in the foreign market, production of films for television and sale of older pictures for showing on television. The sale of theaters, as a result of the Paramount case, just when television was becoming important, may very well have been a blessing in disguise for the majors. In support of this argument is the fact that although theater attendance and box-office receipts are down this year, first quarter dividends of the film companies ran slightly ahead of those for the first quarter of 1955.[62]

The film companies have adjusted their operations to meet the changing times and they look to the future with confidence. This is not to say that all of their ventures prove profitable. As Abraham Montague, of Columbia Pictures, stated:

> I should like to point out to the committee that almost 50 percent of the pictures released each year are losing ventures to Columbia * * *. This is not all. The entire picture is brought into sharper focus if it is realized that excluding the net results of just three productions—From Here to Eternity, The Caine Mutiny, and On the Waterfront—the profits realized by Columbia in both fiscal 1954 and fiscal 1955 would have been substantially wiped out.[63]

Perhaps it is because of the risk involved that no new distributors have appeared on the scene despite the continued profits of the established companies. There have, however, been a large number of new production companies. In February alone, 40 such companies were formed.[64] These so-called independents distribute almost exclusively through the majors and split the profits. Most of them have been formed by directors, stars, producers, and writers who find it to their advantage to share in the profits and pay only a 25-percent capital-gains tax rather than receive a high salary and pay high income taxes. The large film companies find this arrangement to their advantage also as it cuts down on the high fixed salaries which would otherwise have to be paid.

[61] Hearings, op. cit., exhibit 28, p. 311.
[62] Variety, May 16, 1956, p. 15.
[63] Hearings, op. cit., p. 381.
[64] Hollywood Reporter, March 12, 1956, p. 1.

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(D) THE FOREIGN MARKET

One important reason why American film companies have been able to continue profitable operations has been the tremendous growth in the foreign market. Fifteen years ago, the foreign market accounted for only 20 to 25 percent of film rentals received by distributors [65] while today the film industry receives almost half of its income from the overseas market.[66] The extent of Hollywood's foreign operations was brought to the committee's attention by Arnold Picker, vice president of United Artists Corp., in charge of foreign distribution, who stated:

> Basically, to operate in the rest of the world, a major American motion-picture company will do business in well over 70 countries and will normally have branches, subsidiaries, or affiliates in over 100 cities. It will employ or have affiliated with it between 2,000 and 3,000 people, and will probably do a gross business of anywhere from $20 million to $50 million a year. The foreign market would probably be responsible for creating a total gross revenue for the industry of between $275 million to $300 million annually, and it will be responsible for bringing back to the United States each year in excess of $100 million. This foreign market, depending on the company and the nature of its complete operations as well as the product which it handles, accounts for anywhere from 40 to 50 percent of the total business done.[67]

All evidence points to continued expansion in other countries with distributors in an optimistic frame of mind. Annual reports of various film companies make comments such as these:

> More and more we are seeing an increase in our foreign trade. The world markets, fortunately, are consistently expanding; and it is encouraging to report a substantial improvement in the unblocking of foreign funds. Having the largest backlog of picture inventory in our history, we can readily take advantage of these new markets.[68]
>
> We are again gratified to report the continuing development of our foreign markets. Not alone did our domestic business grow within the last fiscal year, but our world market has flourished both in rentals from the exhibition of our pictures and in profits from local production arrangements. Our international operations contribute in great measure to our present healthy condition. They figure strongly in all planning for the future.[69]
>
> Foreign film rentals in 1955 totaled $53,221,020, compared with $41,336,657 in 1954, a gain of 28 percent. This increased volume was due in part to continued improvement in conditions in many foreign countries but more importantly to the highly successful adoption of CinemaScope by leading exhibitors in every nation in the world.[70]

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[65] Y. Frank Freeman, hearings, op. cit., p. 348.
[66] Arnold Picker, hearings, op. cit., p. 403.
[67] Ibid.
[68] Universal Pictures Co., Inc., Annual Report, 1955, p. 3.
[69] Columbia Pictures Corp., 32d Annual Report, June 25, 1955, p. 3.
[70] Twentieth Century-Fox, Annual Report, 1955, p. 8.

All 10 of the major distributors are expanding their foreign markets and are dependent on the profits from these sources to achieve overall profitable operations.

The nine best foreign markets are Great Britain, Italy, France, Japan, Sweden, Australia, South Africa, West Germany, and Brazil.[71] South America and Southeast Asia loom as important revenue sources within the next few years. Eric Johnston, president of the Motion Picture Export Association of America, has stated:

> The next 10 years will, I believe, be marked by further strong expansion of our world business.[72]

There seems to be every indication that Mr. Johnston's optimism is well founded.

While America's major film companies own no theaters in the United States as a result of the Paramount case, they do have sizable theater holdings in other nations. Twentieth Century-Fox, which has one of the largest investments in foreign theaters, this year will acquire more than 140 additional theaters in the Union of South Africa alone. Loew's operates 40 theaters in 15 foreign countries and its president, Arthur M. Loew, has announced that the company is prepared to pour many millions into an expansion of its holdings which will include drive-ins as well as 4-wall houses.[73]

(E) SALE OF FEATURES TO TELEVISION

The film companies have in recent months succumbed to the temptation of the ready money available through sale of old pictures to television. In the past 8 months more than 2,600 pre-1949 pictures have been made available for showing on television. The only companies which are still holding back are Universal and Paramount. Loew's, which had reportedly been offered $50 million for its backlog of 770 features, is the latest to make the move with its announcement in June that it had decided to make available to television its entire library of pre-1949 features. Its pictures, to be distributed by the company itself, include The Yearling, Boys Town, Wizard of Oz, Grand Hotel, The Merry Widow, David Copperfield, Tale of Two Cities, and many other superior productions.

This latest sale by MGM prompted Clark Gable to comment:

> It is a direct invitation to the public to stay at home by their TV sets, and I know it is going to hurt my box office as well as other players earning their livelihood from this business.
>
> I was frankly shocked the other day when I heard that Metro-Goldwyn-Mayer had sold out a great backlog of its fine product pictures running up to as far as 1949. A number of mine are in the group, of course, and when my current features go out to theaters I will find I am definitely in competition with myself.
>
> Why should the public pay to see the stars they like when they can see them on TV at home for nothing? Of course, you cannot force people to go to the theaters, but we shouldn't give them such a legitimate excuse to stay away.[74]

[71] The Film Daily Year Book of Motion Pictures, 1956, p. 99.
[72] Motion Picture Export Association of America, Inc., Annual Report, 1955.
[73] Film Daily, February 8, 1956, p. 1.
[74] Washington Star, July 3, 1956.

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The effect of such sales cannot help but hurt the small exhibitors. The public is not going to be easily moved to go to the movies when classics such as Loew's and other companies are releasing can be seen in one's own home free of charge. As Variety put it: "TV: Studio Meat, Exhib Poison." The trade paper Harrison's Reports, in an editorial, has the following warning:

> It is generally conceded within the industry that the serious decline in theater attendance has been caused principally by the impact of free home television and the abundant number of better feature films that are now being shown on television channels.
>
> It can be anticipated that this competition will become even stiffer as time goes on, for, in addition to improvements in its live presentations, television now has available also large numbers of top-grade motion pictures that have been acquired from the leading film companies in recent months, many of which star Hollywood's most popular players. And many more of these top-grade feature films will be made available to television in the very near future, if pending negotiations with the different film companies are concluded. * * *
>
> The many millions of dollars that have been and will be realized by the film companies on the sale of their old film to television will enrich their treasuries and delight their stockholders. But, as it has already been pointed out in these columns, the end result may prove costly to the film companies, for the quick profits that they are making now may be offset to a considerable extent by reduced earnings of their current and future product, which will have to compete against many of their fine old pictures that will be shown on television free of charge. And if the competition they are setting up forces more theaters out of business, the fewer outlets for their new product will further decrease their earnings and may very well bring disaster to the motion-picture industry as a whole.[75]

Regardless of the merit of Mr. Harrison's warning, it is quite evident that producers have no intention of passing up this opportunity for immediate cash despite the inherent dangers to the industry as a whole.

(F) PRODUCTION OF FILMS FOR TELEVISION

Hollywood is busy making films for television. It is estimated that around 170 small producers are turning out half-hour, hour, and 90-minute shows which already exceed in number the regular feature films being produced for theater distribution. To date, the vast majority of television films have been made by small companies with Columbia the only large producer to venture into the field in a big way.

Television networks have discovered that filmed serials such as I Led Three Lives, Dragnet, I Love Lucy, and You Bet Your Life, pay off, and with the longer productions also proving successful, the outlook is for more and bigger television films. Next season Holly-

[75] Harrison's Reports, May 19, 1956.

wood studios will turn out from 190 to 244 feature-length films which run from an hour to an hour and a half. [76]

Columbia's telefilm subsidiary, Screen Gems, last year grossed $6 million and expects to bring in $11 million this year. With this much money to be made it is only a matter of time before other major producers enter the field on a broad scale. RKO under its new owners is making its studios available to television producers and has indicated that it will eventually produce its own telefilms.[77] Warner Bros. has four new television film series planned.[78] Universal, through its subsidiary, United World Films, Inc., is realizing substantial revenue from producing television commercials and predicts that phase of its business will continue to grow.[79] Twentieth Century-Fox is producing the My Friend Flicka series and expects to have 4 or 5 additional shows this fall.[80]

Exhibitors contend, and with much merit, that these television shows are keeping more and more people away from the theaters and thereby only making worse an admittedly difficult situation. Producers, however, show no inclination to alter their television plans regardless of theater owners' complaints.

VI. Consideration of Exhibitors' Complaints

(A) SHORTAGE OF PICTURES

The number of pictures available to exhibitors has fallen off sharply in the past 15 years. As table II shows, the major companies before World War II were releasing from 360 to 400 pictures a year. With wartime restrictions the number of films fell to less than 300 annually and with the exception of 2 years remained at around the 250 mark until 1954 when feature releases dropped to 225 and then to an alltime industry low of only 215 in 1955.

TABLE II.—*Features released in 1937–55 period by Columbia, MGM, Paramount, RKO, 20th Century-Fox, United Artists, Universal, and Warner Bros.*

1937	408	1947	249
1938	362	1948	248
1939	388	1949	234
1940	363	1950	263
1941	379	1951	320
1942	358	1952	278
1943	289	1953	301
1944	262	1954	225
1945	270	1955	215
1946	252		

Source: Film Daily Year Book of Motion Pictures, 1956, p. 105.

Some exhibitors have charged that curtailment of film output is a calculated scheme by producers to create a product shortage and thereby force film rentals upward. Examination of the number of releases each year by the Big Five reveals, however, that in the postwar period, when they still owned theaters, the number of pictures produced by them was not much higher than it is now—despite the fact the circuits which they owned accounted for a considerable portion of their gross income.

[76] Variety, March 28, 1956.
[77] Film Daily, April 13, 1956.
[78] Film Daily, April 12, 1956.
[79] Universal Pictures Co., Inc., Annual Report, 1955, p. 3.
[80] Twentieth Century-Fox, Annual Report, 1955, p. 4.

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Film companies contend that they have reduced the number of pictures because the public will not pay to see the low-cost B pictures any longer due to free television and therefore emphasis must be upon high-quality films which require tremendous financing. While this argument has considerable validity it does not account for the fact that the number of pictures fell by more than 100 a year from prewar levels even before television became significant competition.

Perhaps a fuller explanation as to the reduction in the number of pictures is that Hollywood has come to realize that by placing emphasis on big expensive productions rather than upon turning out quantity alone, their chances for box-office success are enhanced. Television, the rush to the suburbs, the rise in homeownership and other sociological changes—all of these factors have necessitated drastic alterations in the motion-picture industry.

Regardless of the reasons for the shortage of product it is easy to understand the concern of exhibitors in the suburbs and in small towns. Most of the subsequent-run theaters have to show 2 or 3 different programs a week and in the case of the 12,500 houses showing double features [81] this means as many as 4 to 6 pictures required each and every week, from 200 to 300 a year, which is more than the 8 major film companies are releasing altogether.

The outlook for the current year is somewhat brighter for exhibitors with the majors planning to produce 274 pictures, including independent productions, with the biggest increase by RKO Radio which under its new ownership has 37 pictures underway.[82]

To help alleviate the film shortage Allied adopted a plan whereby exhibitors would finance the cost of a low-cost feature each month to be produced by an independent producer, but this plan has never gotten off the ground due to lack of support on the part of theater owners. TOA has for sometime proposed that the divorced circuits be permitted to make pictures, but to date none of the circuits have stepped forward to ask the Justice Department for permission to do so.

(B) INCREASE IN FILM RENTALS

Along with product shortage the most widespread exhibitor complaint is high film rental charged by distributors. While the exhibitor and distributor spokesmen before the committee differed sharply as to the amount of film rentals, they both attested to the fact that although total film rentals have dropped in the past 10 years they have risen in terms of percentage of box-office receipts.[83] A comparison of the figures on domestic film rental (see table III) with box-office receipts (excluding admission tax) indicates that film rentals have increased from 31 percent in 1946 to almost 36 percent in 1955.

TABLE III.—*Trend in domestic film rental by years*

	Millions		*Millions*
1946	$466. 3	1951	$378. 2
1947	455. 9	1952	369. 9
1948	413. 3	1953	362. 5
1949	404. 3	1954	418. 4
1950	391. 5	1955	421. 9

Source: Sindlinger & Co.

[81] Film Daily Year Book of Motion Pictures, 1956, p. 109.
[82] Ibid., p. 101.
[83] Hearings, op. cit., p. 305.

The basic reason for the rise in film rentals has been the mounting percentages demanded on the better pictures. Gone With the Wind, which came out in 1939 and became the biggest moneymaker of all time, was prereleased on terms calling for an unprecedented 70 percent of box office receipts. In recent years such terms have become common on many top-notch films such as Quo Vadis, A Star is Born, Strategic Air Command, White Christmas, I'll Cry Tomorrow, Caine Mutiny, Battlecry, Country Girl, The Robe, Man With the Golden Arm, and many others.[84] It should be noted that in such deals the exhibitor is usually guaranteed a 10-percent profit after deducting his expenses, which oftentimes brings the rent down below 70 percent. Fifty percent of the gross is common today on first-run pictures and in the case of the picture The Greatest Show on Earth such terms were demanded for both first and second runs. In 1955 Samuel Goldwyn insisted upon and received 90 percent of the gross less house expenses for Guys and Dolls which was distributed by MGM.

High percentage rentals are not limited to the large theaters in metropolitan areas, but are often applied even in smaller communities as well. In the small town of Batesville, Ark. (population 6,500), for example, there are two 4-wall theaters and a drive-in. Mr. W. L. Landers, Jr., who manages one of these theaters which is owned by his mother, in an affidavit to the committee told what he paid in 1954 and 1955 for films of one of the largest distributors.[85] Almost half of the pictures were rented on a percentage basis ranging from 25 percent to 50 percent. Flat rentals ranged from $17.50 to $200. His rent averaged 38 percent in 1954 and 42 percent last year. Mr. Landers suffered a net loss of $920 in 1954 and $1,120 in 1955 on the pictures of this particular company whose terms are not any higher than those of the other major distributors.

Not all small exhibitors, however, have experienced rental increases. Many small theaters, especially in sparsely populated areas of the country, still pay modest prices with top pictures going oftentimes for $15 to $50. Most subsequent-run theaters are still able to rent pictures on flat terms although the trend has been toward more high percentage deals. Distributors still depend for the bulk of their income on the big first-run houses. It is estimated that 83 percent of their revenue comes from only 3,800 theaters.[86]

The smaller theaters have been the ones to feel most keenly any rise in film rentals because their attendance has fallen the most and their admission prices are not high enough to make up the difference. The big first-run houses have also felt the effect of increased rentals, but they are in a much better position to stand the cost due to higher admission prices and the playing of fewer and better pictures.

One basic reason for increased film rentals is the fact that Hollywood is concentrating its efforts on quality rather than quantity production. The days of low-cost B pictures are gone. Furthermore, with the public demanding quality pictures a seller's market has developed; distributors know exhibitors need their top product to fill their theaters with the result being a demand for higher terms.

Competitive bidding has also played a role in higher rentals. This is a system whereby, when two or more theaters in competition with each other desire a particular picture on the same "day and date," the distributor awards the film to that exhibitor offering the best

[84] Exhibitor affidavit 33, hearings, op. cit., p. 530.
[85] Exhibitor affidavit 29, hearings, op. cit., p. 523; also see reply affidavit of Thomas W. Young, p. 673.
[86] Film Daily Year Book of Motion Pictures, 1956, p. 103.

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terms. Competitive bidding was ordered by the district court in the Paramount case in 1946 as the fairest way in which to license pictures desired by two or more competitors. The Supreme Court, however, eliminated this provision on the ground it would involve the judiciary to too great an extent in the affairs of the industry and also that such a system would work to the advantage of the big circuits with the "longest purse."

While compulsory competitive bidding was therefore eliminated, distributors have resorted to bids when competitors demand the same picture for the same run. The film companies contend that this is the most equitable method of settling such disputes and that it also protects them from the charge of discrimination in violation of the Paramount judgments. From the film companies' testimony, it appears that competitive bidding is used in anywhere from 400 to 750 situations, varying with individual companies, which would involve from 1,000 to more than 2,000 theaters.

There can be little doubt that such bidding, by its very nature, has resulted in higher rent for many exhibitors. To further complicate the situation, many four-wall theaters have been placed in the position of having to bid against drive-in theaters which can better afford to pay higher rentals because much of their income is derived from the sale of refreshments and in some cases even complete meals. This explains why so many exhibitors have complained about competitive bidding and why both Allied and TOA are on record in opposition to it.

The committee feels that competitive bidding has inflicted an added hardship upon many exhibitors, but it must frankly admit that it does not have an alternative solution to offer as to what a distributor should do when two or more exhibitors demand the same picture. It should be noted that the exhibitors have not offered any suggestions as to how this system could be eliminated and still provide for licensing of pictures without favoritism or discrimination. The section in the 1955 arbitration draft, analyzed in appendix II of this report, pertaining to competitive bidding, is in the committee's opinion a step in the right direction.

(C) SPECIAL HANDLING OF PICTURES

Exhibitors complained to the committee about prereleasing and special handling of many of the top pictures which they assert is proving increasingly burdensome to the smaller exhibitors.

Because of the unique nature of the motion-picture industry, pictures are not marketed in the same manner as cars or drug products. A picture may rent for several thousand dollars in a showcase theater in a major city, and a few weeks later be offered in a small town for only a few dollars. In distributing pictures, the film companies must take into consideration what method will realize for them the largest receipts. Pictures are generally first made available in the larger cities to theaters with a large drawing capacity which are in a position to pay the distributors the most money. Such theaters are called first-run houses. After the first-run showings and a period of clearance of from 7 to 28 days, the pictures are made available to the smaller neighborhood and suburban theaters on what is known as subsequent-run. Subsequent-run theaters with the largest drawing capacity

obtain pictures on first-run suburban. The smaller theaters get the pictures at a later date on what is called second-run suburban or last-run.

After a picture has been played off in the larger metropolitan areas it is made available for showing in the small towns and rural areas of the country where box-office receipts are less and consequently film rental is much smaller.

A distinction must be kept in mind between *clearance* and *availability* in discussing distribution of pictures. *Claerance* is a bilateral agreement between an exhibitor and distributor as to the number of days which must elapse between the time a picture concludes its run and the time it can be shown in a competing theater. Such an agreement is for the protection of the licensee and gives him assurance his investment in the picture will not be diminished. *Availability* means the fixing of a time when a picture will be made available for showing in a community or area; such decision is made unilaterally by the distributor. The courts have held that both clearances and availability are legal.

Prior to the Paramount decision the film companies used clearances for the purpose of enhancing attendance at their own theaters to the disadvantage of the independent exhibitors. In Washington, D. C., for example, clearances between first- and subsequent-run theaters were only 28 days because Warner Bros. owned the majority of the city's neighborhood houses. In Atlanta, Ga., where the majors had no subsequent-run theaters, they required clearances of 60 days or more on quality films to protect their first-run theaters.[87] The Supreme Court enjoined the granting of clearances between theaters not in substantial competition, and the granting of unreasonable clearances between theaters in substantial competition. In the consent judgments, clearances were defined as meaning "the period of time *stipulated in license contracts* which must elapse between runs of the same feature within a particular area or in specified theaters." [Emphasis added.]

In the case of expensive pictures, distributors oftentimes handle them in a special manner in order to assure financial success. One such method of distribution is *prereleasing*, whereby a picture is shown in a select number of showcase theaters in various cities on extended runs, usually at advanced admission prices, and it is then withdrawn from circulation throughout the country for several months or even a year before it is released for regular first-run exhibition at normal prices. Gone With the Wind was handled in this manner in 1939–40 when it played to packed houses at unprecedented admission prices of a dollar or more. Following the war a relatively small number of pictures were prereleased, such as Quo Vadis, Streetcar Named Desire, and The Jazz Singer, but since 1953 no pictures have been distributed in this way.

Today many top pictures are "specially handled" in each city or area in a manner which distributors feel will reap them the largest return. Such pictures are shown in carefully chosen high-grossing theaters throughout the country on extended run and oftentimes at advanced prices—similar to the method used in prereleasing—but they are not then withdrawn nationally for an extended period of time. Instead, the distributor will then decide area by area how and

[87] The Motion Picture Industry—A Pattern of Control, op. cit., p. 43.

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when he will make such pictures available for general release. In many cases, specially handled pictures play several weeks, or even months, at carefully selected theaters and a considerable period of time will elapse before general release in an area. Specially handled pictures include Guys and Dolls, Strategic Air Command, White Christmas, Rose Tattoo, The Caine Mutiny, Carmen Jones, Jubal, and Cockleshell Heroes.

Exhibitors contend that special handling has a serious effect on subsequent-run and smalltown exhibitors as it adds an additional waiting period before such movies are made available to them; it di rupts a steady flow of pictures; and having run for weeks on extended run, they are "bled white" by the time they are made available to the small exhibitors.

There can be little doubt that special handling of pictures does increase the playoff period in an area. There is reason to believe, however, that many pictures today are being played off too quickly thereby cutting down on theater attendance. A survey made in regard to the picture Quo Vadis showed that "as many as 200,000 people were still waiting for the attraction to play in suburban theaters although it had already played and gone." [88]

Film companies assert that if they are not permitted to distribute pictures as they think best, they will not be able to make sufficient money to produce the kind of pictures people will pay to see.

Accepting for the sake of argument the contention of exhibitors that special handling of films means less business for the small exhibitors, the question remains as to what, if anything, can be done about it. Allied maintains that these special engagements amount to unreasonable clearance and therefore are illegal. Distributors, on the other hand, contend that no clearance is given to exhibitors showing pictures on merchandising engagements and therefore no question of legality is involved. They do admit that the interval of time between such engagements and general release in an area is sometimes longer than the normal clearance period.

The committee does not hold to the position that distributors are resorting to illegal clearance in their special handling of pictures. The meaning of clearance as spelled out in the Paramount judgments, referred to above, is quite explicit in stating that there must be a "period of time stipulated" in the contract between exhibitor and distributor. In the absence of any specific bilateral agreement between the parties, the committee does not believe, legally speaking, that the question of clearance is involved.

Regardless of the legal question, however, the committee can see little practical difference so far as subsequent-run exhibitors are concerned between a bilateral agreement as to clearance and a distributor unilaterally witholding a picture after the merchandising engagement until it sees fit to release it generally. Although clearance is for the benefit of the earlier exhibitor, the Supreme Court has placed definite limits upon it in order to protect subsequent-run exhibitors. For this reason the committee feels there is considerable merit to the recommendation of Allied that the definition of clearance be made broader in scope. The term clearance as used in the 1955 arbitration draft means "the period of time stipulated in license contracts between runs of the same feature within a particular area or in specified

[88] United Paramount Theaters, Inc., annual report, 1952.

theaters." Allied suggests that it be amended by adding the phrase, "or which regularly occurs between the prior and subsequent runs in competing theaters in the absence of any express contract provision describing the same." [89] In 1952, when efforts were being made to work out an arbitration plan the distributors agreed to this amendment which indicates that it would not work a severe hardship upon them. The committee recommends that in considering any arbitration agreement the definition of clearance be broadened as suggested herein.

Exhibitors have complained that many top pictures are first shown in an area on extended runs for anywhere from 2 weeks to several months, thereby delaying their exhibition in subsequent-run theaters and at the same time "milking the pictures dry." Although it can be argued that extended runs cut down on a picture's value by the time it is played in subsequent-run houses, the committee is not prepared to categorically recommend that extended runs be done away with. For one reason, even the exhibitor spokesmen who criticized extended runs did not propose that they be abolished. Secondly, many of the smaller theaters are able to successfully bid for first-run pictures against the larger showcase theaters only because they can play a picture for several weeks and thereby realize a high gross. Also to be seriously considered is the effect there would be on production of quality pictures which the public will pay to see if extended runs at high-grossing theaters were not permitted. Such a major change in the distribution pattern might very well jeopardize the ability of the film companies to make quality productions which all exhibitors need so much today.

(D) ODD SIZE FILM PRINTS

Television competition has stimulated the motion-picture industry to develop new processes for the filming and exhibition of pictures which would encourage people to attend the theater. New processes such as Cinerama, CinemaScope, Vista-Vision, and Todd-Ao have been the biggest technical improvements in the industry since sound was introduced.

The most widely used process is CinemaScope which was developed by Twentieth Century-Fox. It is a process requiring a special lens on the motion-picture projector and a wide screen for exhibition. This equipment is presently installed in almost 17,000 domestic theaters and in approximately the same number of foreign houses. A recent innovation is Cinemascope "55" which uses 55 millimeter film instead of the standard 35 millimeter, but it can be reduced to regular size prints to be used in theaters which have installed standard CinemaScope equipment. The president of Twentieth Century-Fox, Spyros P. Skouras, has announced that his company plans to make 4 pictures a year in the 55 millimeter process with prints available in both 55- and 35-millimeter size.[90] He admitted that it was planned to show The King and I in 35 to 50 theaters, which have the equipment for 55-millimeter prints, for a year before generally releasing the picture in standard size. Due to exhibitor protests, however, this plan was discarded and there will be no delay in releasing the regular size prints.

[89] Hearings, op. cit., p. 22.
[90] Film Daily, February 27, 1956.

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Paramount has developed what is called a horizontal 35-millimeter process known as Vista-Vision which can be shown on regular CinemaScope projection equipment. Positive prints are made for standard projectors.

MGM is now making Raintree County in a new 65-millimeter process and although it has announced that prints can be made in standard width, there is no information available as to the number of such prints which actually will be made.

An even more complicated process is Todd-Ao which uses 65-millimeter film and requires dual projectors which cost $15,000 a pair. The first movie to use the Todd-Ao process is Oklahoma which is produced by Rodgers and Hammerstein and distributed by Magna Theatre Corp. This picture is expected to be playing this summer in 33 cities on road-show engagements in theaters which have installed the necessary equipment.

Exhibitors, especially the smaller ones, quite understandably are concerned about these new processes which entail special projection and sound equipment for showing. With the exception of Oklahoma the pictures which have been made so far in nonstandard sizes are available also in standard size prints, but the question remains as to what the future holds. With Oklahoma being shown in a few select theaters on extended runs and The King and I originally intended to be handled in a similar manner, it could spell serious trouble for small exhibitors who cannot afford to install the expensive equipment needed to show such pictures. Should the film companies decide to make more and more pictures which can be shown only in a few large high-grossing theaters, it could mean disaster for the small local theaters and turn the motion-picture industry into truly class entertainment.

The committee in no sense wishes to discourage improvements in the making and exhibition of pictures, but it does feel very strongly that the film companies have a responsibility to continue to make their pictures available in standard size prints, not only for the benefit of the small exhibitors but for the many millions of people who cannot afford to attend big theaters and pay advanced admission prices.

(E) ACTION BY THE DEPARTMENT OF JUSTICE

The Antitrust Division of the Department of Justice, which has the responsibility to see that the judgments in the Paramount case are enforced, has been criticized by Allied as having been derelict in its duty. Specifically the Division is alleged to have condoned price fixing and illegal clearances, and with being too lenient in regard to the acquisition of additional theaters by the divorced circuits. To back its charges, Allied presented specific incidents involving certain of its leaders.

The issue of clearances as raised by Allied is in reference to the special handling of certain pictures by distributors. As explained earlier in this report, in the case of expensive pictures the distributors sometimes first show them in a limited number of cities in carefully selected theaters prior to general release. In such cases no bilateral agreement is entered into between distributor and exhibitor as to the period of time which must elapse after the initial showing before the distributor may license the picture to other theaters in the area. The judgments in the Paramount case clearly state that clearance involves

a stipulation in the contract between licensor and licensee as to the period of time which must elapse before showing of the picture in a competing theater. In special handling of pictures the distributors determine when they shall be made available for later showing. As the committee has already stated, it does not consider this to involve clearance as the term is defined in the Paramount judgments. Therefore, it cannot agree with Allied's assertion that the Antitrust Division is not enforcing the judgments when it permits the special handling of pictures.

The question of the fixing of admission prices is much more difficult. Allied contends that when distributors, in accepting bids for pictures, ask the exhibitors to state what admission prices they intend to charge, this involves a form of price fixing. The Antitrust Division takes the position that a distributor has the right to ask an exhibitor who is bidding on a picture what price he intends to charge, as this has a direct bearing on the revenue the distributor will receive when the picture is rented on a percentage basis. A distributor cannot, however, require an exhibitor to post the admission price stated in his bid as this would in fact be price-fixing, the Division asserts.

Allied contends that distributors already know what an exhibitor charges for admission and therefore to ask what his price will be is an attempt to force up the price. Implicit in this argument is the contention that exhibitors who own the big first-run houses would charge the same admission regardless of the picture being played. The committee questions whether all exhibitors charge the same for a first-run showing of a top attraction as for a run-of-the-mill picture. In the absence of any evidence that admission prices remain the same on all pictures shown by an exhibitor, the committee believes a distributor has a legitimate interest in asking what the price will be. This is not to say that distributors do not desire to have exhibitors raise their prices. They obviously do, since their receipts depend directly on the box-office gross. Mr. Reagan of MGM admitted to the committee that his company might encourage an exhibitor to boost his price, but that it was the exhibitor himself who in the final analysis made the determination. The committee is not so naive as to believe that an exhibitor who makes a bid in which he states he intends to charge a certain price would actually charge less. Although he may be legally free to do so, it is obvious he would find it most difficult to be awarded a top picture again. The committee recognizes that under this system there is the possibility that a distributor and exhibitor may actually agree between themselves on a certain admission price and thereby be engaging in illegal price fixing. But such danger does not make the system itself necessarily illegal.

Even though, as Allied charged, distributors are forcing admission prices up, the question remains whether this is illegal. If, in order to assure a high rental, a distributor told an exhibitor he wanted $1.50 on every admission when he knew the exhibitor's usual admission price was only $1, this would not be price fixing despite the fact that the exhibitor in order to make a profit would have to raise his admission price. A distributor is also legally free to demand a flat rental which is so high as to force an exhibitor to raise his prices; the effect that this has upon the exhibitor's admission price is immaterial.

If distributors are acting illegally in the special handling of pictures and in asking for admission prices in bid situations, exhibitors [them-

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selves are free to bring an action to enjoin such practices and to sue for treble damages. To the best of the committee's knowledge, no effort has been made to test the legality of these practices despite the fact that the Paramount decree prohibits distributors from price fixing and from granting unreasonable clearances.

The divorced circuits were precluded from acquiring additional theaters until they completely divested themselves of certain theaters in closed situations. All of the divorced circuits, with the exception of American Broadcasting-Paramount Theatres, Inc., which still has 24 theaters, have made the required divestitures and are free to acquire additional theaters upon a showing that each such "acquisition will not unduly restrain competition." The first such acquisition was in February 1955. To date there has been a total of 13 acquisitions. In each case but the first there was a court hearing, prior notice in the trade press, and exhibitors who desired to present information to the court bearing on the acquisition were granted the opportunity to do so.[91] Allied recommends that when a divorced circuit applies for permission to buy or build an additional theater, the Department of Justice notify the independent exhibitors in the area at least 60 days prior to determination or hearings so that such exhibitors will have sufficient time to prepare and submit their facts and arguments on the matter. The committee feels that such recommendation for prenotification should be carefully considered by the Department of Justice in order to assure the small exhibitors every opportunity to present their case.

The examples offered by Allied as to situations in which the Division was allegedly negligent are in the committee's opinion far from being black and white situations. While the exhibitors presented convincing testimony as to alleged misconduct by the Division, the reply by the Division itself indicated a sincere effort to assist the theater owners in difficult situations. On the basis of the record submitted to the committee it cannot condemn the Antitrust Division in these specific cases.

There is naturally an inclination on the part of exhibitors to attribute a share of their present difficulties to lack of enforcement by the Division. It would, perhaps, be expecting too much of an interested party in a dispute, such as this, to admit he was being fairly treated. There have no doubt been cases in which the Division has been in error, but the committee in reviewing the situation concludes that the judgments in the Paramount case are being conscientiously enforced by able persons. Enforcement of the judgments is a most complicated business in which there is room for considerable difference of opinion as to interpretation and application. The Antitrust Division in an effort to be fair to distributors and exhibitors cannot fail to escape criticism by one side or the other regardless of what course of action it follows.

VII. Consideration of Exhibitors' Proposals

(A) ARBITRATION OF FILM RENTAL

The most controversial issue presented to the committee was arbitration of film rentals. Under the joint proposal of Allied and TOA,

[91] See statement of the Antitrust Division, hearings, op. cit., p. 74.

the two largest exhibitor organizations, when an exhibitor shows a picture and finds that his box office receipts are not sufficient to pay the agreed-upon film rent and still "realize a fair profit" he could invoke arbitration to determine what a "fair rental" should have been and obtain a refund from the distributor.[92] Such arbitration could only be invoked by exhibitors, never by distributors regardless of the profit a theater owner should happen to realize on a particular picture.

In answer to a committee question as to why film rental arbitration should not be a "two-way street" with distributors also having the right to ask for arbitration when they feel the rent charged proved to be too low, Mr. Myers of Allied stated:

> I don't believe there is any factual basis that would justify that, Senator Goldwater. Moreover, we are thinking of arbitration as an adjunct to the decree in the Paramount case. It has always been considered on that basis and no other. Every draft, you may have noticed in the record, has contemplated that it be entered in the court records as a part of the proceedings in that case. * * *
>
> I think you will absorb as we go along some of the atmosphere of the case and why it was that one-way arbitration is the only kind of arbitration that has at any time been considered since the decrees were entered in that case.[93]

What Mr. Myers failed to point out was that the purpose of arbitration which distributors and exhibitors have been attempting to work out is to settle disputes arising as to matters regulated by the Paramount judgments. For this reason arbitration has been considered as a one-way street because it is the distributors which are regulated, not the exhibitors. Arbitration of such matters as clearances, runs and forced-sales would be to the advantage of distributors for it would alleviate costly and time-consuming court action brought against them by exhibitors. The question of film rentals is an entirely separate and distinct matter which has no connection with the Paramount case. Distributors are in no way restricted as to the amount they may charge for their pictures. They are perfectly free to obtain the best price they can get for their product in open competition.

Exhibitor witnesses admitted in answer to questioning by the committee that there is no precedent in this country for arbitration of film rentals, it is, therefore, quite understandable why distributors should be so vigorous in their opposition to such a proposal. It is significant to note also that none of the exhibitor spokesmen have even suggested that they might be willing to have 2-way arbitration of film rentals although if the statistics as to film rentals presented to the committee are accurate the exhibitors would certainly benefit even in a 2-way arbitration system.

The right of a seller to determine the price at which he will sell his goods is basic to our economic system, and it is only in the case of extreme emergencies or unusual circumstances that such right can be legitimately curtailed. Recognizing the extreme plight of thousands of exhibitors throughout the Nation, the committee feels, nonetheless, that the demand for 1-way film rental arbitration is unrealistic and its effect could well be to so change the entire industry as to only increase the exhibitors' problems. To demand that distributors guarantee all

[92] Hearings, op. cit., p. 17.
[93] Hearings, op. cit., p. 18.

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exhibitors a "fair profit" is contrary to our economic system and philosophy. It is true that certain industries are guaranteed a fair profit such as natural gas companies and telephone companies, but in these cases they are considered to be public utilities and as such also regulated in the prices which they may charge of purchasers. The committee is not convinced that the motion picture industry is or should be considered a public utility which in effect Allied and TOA are asking be done. Film rentals are not an arbitrable subject since arbitration is not designed to guarantee a profit on every picture for every exhibitor. The committee does not agree with the contention that an arbitration system which does not deal with film rental would be meaningless.

(B) PRODUCTION OF PICTURES BY DIVORCED CIRCUITS

TOA and Allied jointly have proposed that the divorced circuits "be permitted to produce and to distribute motion pictures with preemptive rights for their own theaters which they now own and legal replacements thereof, and not to theaters that they may hereafter acquire." [94] At the present time as a result of the Paramount judgments producers and distributors are not in the exhibition field, and none of the divorced circuits are making pictures for general distribution. The consent judgments entered into by RKO and Paramount did not specifically prohibit the divorced circuits of those two companies from making pictures, nor did they specifically prohibit these two producing-distributing companies from purchasing theaters following divorcement. The consent judgments entered into by Loew's, Warner Bros., and Twentieth Century-Fox at a later date, however, did specifically prohibit the divorced circuits of these three companies from making pictures without court approval, and also prohibited the producers-distributors from purchasing theaters without court permission.

As early as 1953, TOA endorsed the proposal of one of its members, National Theaters, that the divorced circuits be permitted to make pictures.[95] Until January of this year, Allied has never indicated any sympathy with such a proposal, and as late as last fall it expressed its concern as regards the large circuits, in a resolution which stated that—

> * * * the exhibitors assembled at Allied's 1955 national convention are convinced that expansion of the divorced theater circuits constitutes the gravest menace of all to the independent exhibitors of the United States and threatens a revival of the domination and control of the exhibition field which it was the declared purpose of the Government and of the courts permanently to end * * *[96]

Today, however, both TOA and Allied are urging integration on the part of the divorced circuits coupled with preemptive rights on the grounds that such a step would help to ease the shortage of pictures which is one of the major causes of exhibitors' difficulties.

Because of the great changes in the industry resulting from the rise of television, serious attention must be given to any proposals which would increase the supply of pictures. At the time of the Paramount

[94] Hearings, op. cit., p. 187.
[95] Variety, November 4, 1953, pp. 3, 22.
[96] Hearings, op cit., exhibit, 8 (a), p. 53.

case, divorcement was considered a necessary step to put an end to trade practices which were harming independent exhibitors. The committee does not take the position that any and all proposals to bring about integration are necessarily wrong, in view of present-day conditions which no one could have foreseen when divorcement was brought about. Care must be taken, however, to consider suggested changes in the light of being fair to all segments of the industry so no one is put in a preferred position. The proposal of Allied and TOA does not, in the committee's opinion, provide an equitable solution. Under it the divorced circuits would be permitted to integrate while at least three of the major distributors-producers would continue to be restricted as to entering the exhibition field. Furthermore, the circuits would be granted preemptive rights on the pictures they make. This was one of the evils which brought about the Paramount case in the first place. The dangers and inequities involved in this plan are too great. The committee therefore rejects this proposal and urges the Department of Justice to oppose it.

(C) TAX RELIEF

In 1954, Congress reduced the theater tax from 20 percent to 10 percent and completely removed it on admissions of 50 cents and less. It is estimated that 5,200 theaters are now operating at a loss and 5,700 more are doing little better than breaking even.[97] The committee was convinced from the estimony that repeal of this tax was very much in order as continuation of such a burden would inevitably mean additional theater closings, and a resulting loss of revenue to the Federal Government.

On Saturday, July 21, 1956, the House of Representatives passed H. R. 9875, a bill to raise the theater tax exemption from the present 50 cents to 1 dollar. On behalf of the committee, Senator Sparkman as chairman and Senator Humphrey as subcommittee chairman wrote on July 23 to the chairman of the Finance Committee, Senator Byrd, respectfully recommending that H. R. 9875 be approved and reported to the Senate for consideration. The letter pointed out that the hearings showed "that the small theater owners located in rural areas, small towns, and suburbs of the larger cities are in a most difficult financial plight" and that "in the committee's report which will soon be submitted to the Senate, it is recommended that the motion picture admission tax be removed in order to give a measure of assistance to thousands of hard-pressed exhibitors." The committee is most pleased to note that the Finance Committee reported this bill to the Senate which acted upon it July 26. The bill as finally approved by Congress completely exempts from the theater admission tax all admissions of 90 cents or less.

(D) LOANS BY THE SMALL BUSINESS ADMINISTRATION

The suggestion was made to the committee that the Small Business Administration provide funds to theater owners when they cannot obtain loans in connection with their business from financial institutions. Lending institutions are understandably hesitant to lend money to exhibitors due to the downward trend in the industry.

The Small Business Administration was established by the Gov-

[97] Hearings, op. cit., p. 201.

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ernment for the purpose of assisting small business and furnishing loans when such are not available from ordinary lending sources. The Loan Policy Board of SBA, has ruled that no funds shall be granted to finance "amusement facilities," which includes theaters. The committee recommends that the Small Business Administration carefully consider the advisability of revising its rules so that theater owners may qualify for loans.

(E) LEGISLATION TO REGULATE FILM RENTALS

The spokesmen for Allied have proposed that if the distributors do not agree to arbitration of film rentals the Federal Government should enact legislation to regulate film prices. Allied presented to the committee a bill it has prepared which would authorize the Federal Trade Commission to determine "fair and reasonable" film rentals with such determinations enforcible in a court of law.[98]

It is true, as Mr. Myers notes in his supplemental statement,[99] that Congress has regulated in various degrees certain fields such as banks, railroads, trucking, radio, television, shipping, petroleum, meat packing, and electricity. All of these, however, with the exception of the banking and meat-packing industries, are regulated because by their very nature free, unrestricted competition is impossible. In the case of meat packing, Federal regulation is to protect the health of the American people. Banks are regulated to preserve the overall economic stability of the country. The film industry is not analogous to any of these operations. There is no limitation on anyone who may desire to become an exhibitor, producer, or distributor. Prior to the Paramount case there were very definite restrictions in the motion-picture industry which made it difficult if not impossible for anyone to enter the field, but this is not the case today.

The basic philosophy upon which our Nation was founded and which continues to this day is that the people themselves control their own affairs as much as possible and Government regulation should be resorted to only when certain people or groups of people interfere unjustly with the freedom and rights of others in the society. The committee, in accord with this basic philosophy believes that the motion-picture industry itself is best suited to settle its problems such as that of film rentals. It does not feel the present situation warrants Government regulation. If men on both sides in the industry will sit down in a genuine effort to arrive at an equitable settlement of their differences the committee believes a satisfactory arrangement can be arrived at. The antagonism which is so evident between the distributors and exhibitors is only making matters worse. If this hostility continues the time may very well come when Congress will have to, through sheer necessity, take remedial action. Mature conduct on the part of industry leaders is needed if the current problems are to be settled on a voluntary basis without involving the Federal Government.

(F) FAIR TRADE PRACTICES COMMISSION

The Southern California Theater Owners Association has proposed that a Fair Trade Practices Commission be established for the purpose

[98] Hearings, op. cit., Appendix II, p. 484 ff.
[99] Hearings, op. cit., p. 277.

of adopting and enforcing rules of fair competition in the motion-picture industry.[1] It takes the position that such a Commission would be able to do a more effective job in assuring protection of small exhibitors than can the Department of Justice.

This proposal is similar in certain aspects to that calling for Federal regulation of film rentals as it would involve the Government to a considerable extent in the internal affairs of the industry. For the reasons already stated in regard to the proposal for rental legislation, the committee takes the position that a Commission is not justified at this time and that the disputes within the industry can be and should be equitably and speedily settled by the exhibitors and distributors themselves.

VIII. Conclusions and Recommendations

(A) CONCLUSIONS

Motion picture exhibitors have been experiencing very difficult times. Those who have suffered most have been owners of conventional four-wall theaters in rural areas, the smaller towns and cities, and those playing subsequent-run pictures in the larger communities. Literally thousands of four-wall theaters have been forced to close their doors as a result of declining attendance and box-office receipts. At the present time, total theater expenses are in excess of income received from admissions. Attendance is down this year over last. Unless the situation improves significantly during the remainder of the year, attendance figures will be the lowest since before World War II.

A major cause of declining theater attendance has been the phenominal growth of television. Studies have clearly shown that as television enters an area theater attendance declines and theater closings continue until the saturation point in ownership of television sets is reached. The public will not leave the comfort of their living rooms and free TV entertainment, except to see movies of unusual quality. In order for the independent exhibitors to be successful they need to have more top-quality pictures than are being produced today. The large film companies have not helped the exhibitor in his plight by their recent sales of older pictures for showing on television.

A further reason four-wall theaters have been experiencing economic difficulties has been the rapid growth of drive-in theaters which have more than offset the closing of conventional houses in terms of the total number of theaters in operation. Many people today, especially those who live in the suburbs, will patronize the drive-ins which are conveniently located and which offer the same pictures as can be seen in conventional theaters.

Exhibitors who have been fortunate enough to survive, despite the competition of television and drive-in theaters, are facing the difficulty of obtaining a sufficient number of pictures which have box-office appeal. Whereas 10 years ago almost any picture would draw well, today's theater patrons are much more discriminating in their tastes and insist on quality productions. The big showcase theaters, owned for the most part by the five divorced circuits, are able to do a reason-

[1] Hearings, op. cit., p. 214.

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ably good business because they show a picture for anywhere from 1 week up to several months and can therefore be selective in the films which they exhibit. The independent smaller exhibitors are not in such a fortunate position as they do not have sufficient patrons to run a picture of even top quality for more than a few days at most. The total number of pictures available to these small exhibitors is today barely sufficient to meet the demand and many of these pictures simply do not attract large audiences.

Exhibitors face another difficulty in that while attendance and admission grosses have been going down, the price of pictures has been steadily going up. Film rental in terms of percentage of admission gross has risen in the past 10 years from 31 percent to 36 percent. There are several reasons for this phenomenon. The film companies today are concentrating more than ever on making pictures with good plots, writers, stars, directors, and producers; this has resulted in the cost of pictures rising astronomically. The rise in production costs has been reflected in distributors' demands for higher film rental. With emphasis on fewer and better pictures which have high box-office appeal, distributors know full well they have an advantage over exhibitors who are dependent upon such pictures for survival. In this sellers' market distributors are driving harsher bargains than ever before. Another factor contributing to increased rentals is competitive bidding used in as many as 750 situations, involving more than 2,000 theaters, where two or more competing exhibitors desire the same picture at the same time.

Another contributing factor for declining attendance may well be the faster playoff of pictures and the increase in multiple showings. The public is limited in its choice of pictures because so many subsequent-run theaters play the same movie at the same time. Not only is there a resulting loss of patronage, but with several theaters in an area showing the same pictures at once the attendance at each is cut down. Faster playoffs have reduced the valuable word-of-mouth advertising which is so important to a picture's success; by the time many potential customers hear about a particular movie it has already played and gone in their community. This pattern of distribution exists because many exhibitors have had their run position moved up to that of their competitors and clearances have been reduced and in many cases eliminated.

While the major film companies have seen their income drop, they have been more fortunate than the small exhibitors and have operated at a reasonable profit. One reason for this is that film companies are turning out fewer and better pictures which the public will pay to see. Motion picture spectaculars in recent years have brought in generous returns. The majors have also been expanding their overseas operations with almost half of their business now coming from foreign sales. Several companies have extensive theater holdings throughout the world and plans call for further investment in this profitable field. Television has also proved a profitable source of income; film companies have in recent months released many of their old pictures for television showing despite the effect this has upon theater attendance. Many small production companies have been making films for television and the large producers are now beginning to enter this rich field on a big scale.

(B) RECOMMENDATIONS

The committee believes that many of the problems and disputes between distributors and exhibitors can be settled within the industry itself if the responsible leaders on both sides will put a stop to the constant fratricidal warfare which does nothing but worsen a difficult situation.

(1) Arbitration

An arbitration system dealing with such topics as clearances, runs, competitive bidding, forced sales and contract violations would be a major step toward a more amicable atmosphere. The committee does not believe arbitration of film rentals to be warranted. The arbitration draft prepared by industry members in 1955 would, in the committee's judgment, be of benefit to exhibitors and distributors alike. It regrets that after considerable time and effort in the preparation of this plan and arrival at a tentative agreement between distributors and the largest exhibitor organization (TOA), the negotiations failed at the last moment with the withdrawal of TOA. Perhaps the arbitration draft did not contain all that exhibitors would have desired, but it was at least an effort in the right direction. If the situation is as serious as the committee was led to believe by exhibitors' complaints and testimony, then it is an absolute necessity that both sides be willing to compromise in order to settle their disputes.

(2) Small Business Administration

Many exhibitors sorely in need of additional funds in order to make necessary improvements in their theaters and install the new sound and projection equipment are finding it extremely difficult to secure loans from financial institutions. Without financial help to make these needed improvements which the public demands, many exhibitors will have to close. The committee recommends to the Small Business Administration that its Loan Policy Board consider the advisability of making theaters eligible for loans in those cases where regular lending institutions will not grant credit.

(3) Clearance

As a result of the Paramount case the film companies are prohibited from granting unreasonable clearances between theaters in substantial competition. This restriction on the manner in which pictures may be distributed is to protect the subsequent-run theaters and assure them the right to pictures within a reasonable period of time after they have been shown at the prior-run houses in the area. Clearance as defined in the Paramount judgments means a bilateral agreement between a distributor and exhibitor as to a stipulated period of time which must elapse between the time a picture plays at the exhibitor's theater and is shown at subsequent-run theaters in the area. If the distributor does not enter into such a bilateral agreement, but instead unilaterally determines when a picture shall be shown in subsequent-run theaters in an area, no question of clearance arises. The trend is toward showing top pictures in a limited number of cities at selected high-grossing houses for long-run engagements at advanced prices and later, at the distributor's pleasure, making them available for general release. Distributors in this way realize a greater financial return than if such pictures were released in the ordinary manner. In order to give subsequent-run exhibitors a measure of protection and insure that

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special handling of films will not result in an unreasonable period of time elapsing between initial showing in an area and subsequent-run release, the committee recommends that in any arbitration plan worked out by industry members the definition of "clearance" be broadened to include the period of time elapsing between prior and subsequent-runs of a picture shown in competing theaters.

(4) Competitive bidding

Competitive bidding has been a contributing factor to the rise in film rentals. This method of licensing has been resorted to by distributors as the fairest way in which to rent pictures desired by competing exhibitors for the same day-and-date showing. This system has not only proven to be time consuming and cumbersome, but it has also been a heavy burden on many exhibitors. No alternative plan, however, was offered to the committee to take the place of competitive bidding. The restrictions on its use as contained in the 1955 arbitration draft are certainly an improvement.

(5) Notice to exhibitors

Four of the five divorced circuits have completed the sale of certain theaters they are required to dispose of under the terms of the Paramount judgments, and they are now free to buy or construct additional theaters so long as such acquisitions do not substantially restrain competition. At the present time, when application is made by a circuit for permission to acquire a theater, the Department of Justice places such notice in the trade press for the benefit of exhibitors who might be affected by the acquisition and therefore wish to raise objections. The committee recommends to the Department that in addition to notice through the trade press, exhibitors located in the area where the acquisition is to be, should be sent letters informing them of such application and the date of hearing. This would assure exhibitors of every opportunity to prepare and present to the Department or to the court their arguments on the matter. Such notice should be sent early enough to assure exhibitors sufficient time to adequately prepare their material.

(6) Standard size prints

The motion picture industry has made tremendous strides in recent years in technical improvements. Cinerama, CinemaScope, VistaVision and Todd-Ao are examples of Hollywood's achievements. Some of the new processes now being employed use larger film than the standard 35 millimeter. With the exception of Cinerama and Todd-Ao which are not intended for general distribution, pictures made in these large film processes have so far been made into standard size prints so that they may be shown on the conventional projection equipment. If such pictures should not be made available in standard size prints it will mean that the vast majority of exhibitors who run small theaters will not be able to play them as they cannot afford to buy the very costly new projection equipment required for their showing. The committee urges the film companies to realize their obligation to the small exhibitors and to the millions of theater patrons who cannot afford to attend the showcase theaters. It urges that pictures made in the large film process be also made available in standard size prints so that small exhibitors may be able to exhibit such movies.

(7) *Saturation bookings*

Today, more than ever before, theater goers are limited in their choice of pictures because so many theaters in an area play the same picture at the same time. It is understandable that each exhibitor desires to play pictures as early as his competitors, but the end result appears to be a loss of attendance. Coupled with this problem is the fact that many pictures are played off so quickly in a community that potential patrons often times miss them altogether. The committee suggests that the industry study what effect this has had on theater attendance and what possible changes can be made that would still assure equal treatment to all exhibitors.

(8) *Production of pictures by divorced circuits*

The committee does not approve of the proposal offered by Allied and TOA that the divorced circuits be given permission by the court to produce and distribute pictures with preemptive rights for their own theaters. It believes that such a proposal would be unfair in view of the fact that three of the major film companies are prohibited from owning theaters under the terms of the Paramount judgments. If the divorced circuits are to be permitted to have an integrated operation then it is only just that the producers-distributors also be granted the right to intergrate. The committee, therefore, is opposed to this proposal and recommends to the Department of Justice that it be rejected.

(9) *Federal legislation*

The committee looks with disfavor upon legislation to regulate film rentals which has been proposed as necessary if distributors will not agree to arbitrate film rentals. Such regulation is uot in accord with our economic system; legislation has only been applied in regard to industries which by their very nature are restricted in terms of competition such as electric power, telephone service and the like. The motion picture industry, however, does not fall into this category. There are no restrictions as to entering any phase of the industry. The committee believes that topics such as film rental can best be handled by the industry members themselves rather than by the Federal Government.

It has been proposed that the Congress establish a Fair Trade Practices Commission which would adopt and enforce rules of fair competition in the motion picture industry. Although this proposal does not deal with film rentals, it is in a sense similar to the above-mentioned suggestion for Federal regulation of film rentals as it would call upon the Federal Government to involve itself directly in the motion picture business. The committee does not feel that a Commission is called for; the problems within the industry can be more easily handled and settled by the exhibitors and distributors.

(10) *Need for cooperation*

The small independently owned motion picture theaters are an important institution in thousands of communities throughout the country. They offer to millions of men, women, and children economical and wholesome entertainment. They represent a sizable investment in capital and offer employment to tens of thousands of people. Despite the growth of television, the public still enjoys motion pictures; the large box-office returns of top pictures in recent

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years proves this point. The smaller theaters can and should continue to play a significant role in the motion-picture industry.

The committee after having carefully studied the copious testimony and exhibits presented at the hearings this spring, is of the opinion that there is a vital need for a new spirit of cooperation between the various segments of the industry. The producers and distributors have a very real obligation to the independent exhibitors, and the committee does not feel that this obligation has been met to the extent that it should. The recent release of older pictures by producers for showing on television, which is certain to work a hardship on the smaller theaters, indicates a lack of regard as to the plight of exhibitors.

The committee cannot overemphasize the responsibility resting upon the large film companies to do everything in their power to make it possible for independent motion picture exhibitors to continue in business and to realize a fair and reasonable profit. The time is at hand for a mature and objective appraisal by the industry of all the factors involved in the exhibition of pictures with the goal in mind of rendering assistance to independent theater owners so that they may be able to thrive and prosper.

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APPENDIXES

Appendix I

Definitions of Motion-Picture Industry Terminology

Arbitration—A system for settling certain types of disputes which arise between an exhibitor and distributor, such as clearance, runs, rentals, etc., by submitting the dispute to an arbitration board which has authority to decide the controversy and render a settlement binding upon the parties.

Blanket deal—(See Master agreement.)

Block booking—The practice of licensing, or offering for license, one feature, or group of features, upon condition that the exhibitor shall also license another feature or group of features released by the distributor during a given period.

Circuit—The 1940 consent decree in *U. S.* v. *Paramount* referred to "circuits of more than five theaters."

Clearance—Period of time (stipulated in license contracts) which must elapse between conclusion of one run and commencement of second run of the same feature in a given area.

Day and date—Two or more theaters running same feature at the same time.

Decree—Although for some years reference to the decree was to the consent decree dated November 20, 1940, in *U. S.* v. *Paramount*, later decrees were entered in that case and the consent decree has had no effect for some years.

Later decrees were entered in *U. S.* v. *Paramount* as follows:

RKO: Consent judgment dated November 8, 1948.

Paramount: Consent judgment March 3, 1949.

Warner, Loew's, and T. C. Fox: Decree of district court February 8, 1950, as to so-called major defendants.

Columbia: Universal and United Artists: Decree of district court entered February 8, 1950, as to so-called minor defendants.

Subsequent to the February 8, 1950, decree entered against Warner, Twentieth Century-Fox and Loew's consent judgments were entered as follows:

Warner, January 4, 1951.

Twentieth Century-Fox, June 7, 1951.

Loew's, February 6, 1952.

Distributor—A distributor is a person, firm, or corporation engaged in the business of licensing the exhibition of motion pictures and distributing the positive prints of these motion pictures to the exhibitors whom it licenses to exhibit them. The prints are usually licensed to the exhibitor. However, the arrangement is frequently referred to in the industry as a sale.

Exchange district—An area in which an office is maintained by a distributor for the purpose of soliciting license agreements for the

exhibition of its pictures in theaters situated throughout the territory served by the exchange and for the physical distribution of such films throughout this territory. There are 32 such exchanges in the country.

Exhibitor—Any individual, partnership, unincorporated association, or corporation engaged in the public showing of motion pictures in a theater or theaters for profit.

Feature motion picture—Any motion picture, regardless of topic the length of the film of which is in excess of 4,000 feet.

License—An agreement by which a distributor grants the right to show a motion picture in any theater whose purpose is the exhibition of motion pictures for profit.

Master agreement—A license agreement, also known as a blanket deal, covering the exhibition of features in a number of theaters usually comprising a circuit.

> The master agreements found objectionable in the opinion of the court in *U. S.* v. *Paramount* are those that "cover exhibition in two or more theaters in a particular circuit and allow the exhibitor to allocate the film rental paid among the theaters as it sees fit and also to exhibit the features upon such playing time as it deems best."

Motion-picture season—Period from September 1 of one year to August 31 of the next year.

Moveover—The privilege given a licensee to move a picture from one theater to another as a continuation of the run at the licensee's first theater.

Pooling agreements—(1) Given theaters of two or more exhibitors normally in competition are operated as a unit, (2) business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors, (3) profits of "pooled" theaters are divided among owners according to prearranged percentages.

Premier—The term is used rather vaguely in connection with so-called gala openings of motion pictures.

Prerelease—The showing of a picture in a select number of showcase theaters in certain cities on extended runs, usually at advanced admission prices. Following such showing the picture is withdrawn nationally from circulation for a considerable period of time—6 months to a year—before being released for regular distribution at normal admission prices.

Prints—Positive copies of films.

Road showing—A public exhibition of a motion picture in a limited number of theaters, in advance of its general release, at admission prices higher than those customarily charged in first-run theaters in the areas where they are located.

Runs—The successive exhibitions of a motion picture in a given area, first run being the first exhibition in that area, second run being the next subsequent, and so on.

Short subject—Any motion picture of less than 3,500 feet in length.

Special handling—A method of distributing pictures whereby they are first shown in select cities and theaters on extended runs, often times at advanced prices, and later made available for general release area by area at the discretion of the distributing company.

Trade showing—Exhibition of a feature film at a theater or projection room for the benefit of exhibitors.

Trailer—A special short film advertising a coming attraction.
Wholly owned theater—A theater in which one theater company, together with persons who are solely investors, own a beneficial interest of 95 percent or more in the fee or lease of said theater.

APPENDIX II

ANALYSIS OF 1955 ARBITRATION AGREEMENT

The purpose of the agreement is to establish and maintain a voluntary system of arbitration to settle controversies of the kind specifically described herein which arise between motion-picture distributors and exhibitors. Only the exhibitors would be allowed to ask for arbitration of such disputes.

The agreement would become effective only upon being signed by the distributors and motion-picture exhibitor organizations, being consented to be the Attorney General of the United States and approved by entry of an order of the United States district court. The system would remain in operation for a test period of 12 months.

ESTABLISHMENT OF SYSTEM

The arbitration system would be organized and supervised by a national administrative committee to be composed of 3 members designated by Theatre Owners of America, 1 member designated by Independent Theatre Owners Association, Inc., 1 member designated by the International Drive-In Theatres Association, and 3 members designated by the distributors signing the agreement. The committee could add to its membership not more than three representatives from any organization which later signed the agreement.

The decisions and directives of the committee would require the unanimous consent of its members with the distributor members jointly having one vote as would the exhibitor members.

LOCAL ARBITRATION COMMITTEES

The committee would establish in each of the 32 exchange centers of the United States local arbitration committees to be made up of an equal number of exhibitor and distributor members chosen by the exhibitor and distributor members of the committee, respectively.

Each local committee would have the responsibility of supervising arbitration in its territory and of compiling a list of neutral arbitrators. The decisions of such local committees would require the consent of both distributors and exhibitors with each side having one vote.

NATIONAL APPEALS BOARD

The national committee would establish a national appeals board to hear all appeals on questions of damages. This appeals board would be made up of three impartial nonindustry members unanimously agreed upon by members of the national committee.

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FINANCING

Expenses of the arbitration system would be financed by equal contributions from distributors as a unit and exhibitor groups, which are parties to the agreement, as a unit.

ARBITRATION PROCEDURE

When an exhibitor filed a complaint with the clerk of the arbitration committee for his area, a panel of arbitrators would be selected with the complainant exhibitor and the respondent distributor each selecting an arbitrator, and the two so designated choosing a third neutral arbitrator. If no agreement could be reached on a neutral arbitrator within 7 days, the local arbitration committee would select one from the list of neutral arbitrators it had compiled. The neutral arbitrator would be paid on a per diem basis, plus travel expenses, with the amount to be determined by the national committee. Any exhibitor or distributor who felt his business might be affected by the arbitration could as a matter of right intervene in the proceeding. In case the intervenors and the respondent distributors could not agree upon an arbitrator, then the proceeding would be heard and determined by three neutral arbitrators selected by the local arbitration committee.

The place where the arbitration hearings would be held would be decided by the arbitrators and the parties to the dispute, and if no agreement could be reached the arbitrators themselves would select the place. The arbitrators would fix the time for the hearings.

Each side in the dispute would be entitled to be represented by 1 attorney and if there were any intervening exhibitors they each would be entitled to have 1 attorney present on their behalf.

The decision reached by the arbitrators would be in writing and require the concurrence of 2 of the 3 arbitrators. The awarding of damages would be made by the arbitrators only when the exhibitor in his complaint claimed damages. When damages were awarded, the theory upon which and the period of time for which allowed would be set forth in the memorandum of decision. The arbitrators could assess costs of the proceeding (excluding counsel fees) against the losing party or apportion such costs as they deemed just.

When an award was granted in favor of an exhibitor, any party to the dispute could appeal to the national appeals board from that part of the award granting or denying damages. No other part of the award would be subject to appeal. No appeal could be made when an award was in favor of the distributor.

The appeals board would receive briefs from the parties to the dispute and could, in its discretion, grant oral argument. The appeals board's power would be limited to: (1) Affirming that part of the decision which granted or denied damages; (2) increasing or decreasing the amount of damages, or fixing the amount of damages if denied; and (3) reversing that part of the decision which granted damages. The decision of the appeals board with respect to damages would be final and binding upon the parties to the dispute.

DISPUTES SUBJECT TO ARBITRATION

The type of disputes arising between exhibitors and distributors in which an exhibitor could demand arbitration are specifically: clearances, runs, competitive bidding, conditioning of one license upon another, and contract violations. Disputes as to film rental charges are not subject to arbitration.

CLEARANCE

Disputes arising upon the complaint of an exhibitor to the effect that clearance was granted by a distributor between theaters not in substantial competitition, or that clearance of an unreasonable duration was granted between theaters in substantial competition, would be subject to arbitration.

In any arbitration proceeding involving clearance, the burden of sustaining the reasonableness of the clearance would be upon the distributor who granted such clearance.

If the arbitrators found in favor of the exhibitor they would have the power to order the distributor to stop granting clearance when the theaters involved were not in substantial competition, when the theaters were in substantial competition the arbitrators could fix the maximum clearance which could thereafter be granted by the distributor. If damages were asked for by the exhibitor, the arbitrators could award damages from the date when a demand was made for a change in clearance and covering that period of time during which the clearance complained of was actually in force.

RUNS

Disputes arising upon the complaint of an exhibitor to the effect that a distributor had been requested and refused other than on the merits to grant the complainant a desired run equal to that afforded a competing exhibitor, would be subject to arbitration.

If the arbitration board found in favor of the exhibitor, it would direct the distributor to grant to the exhibitor the opportunity to license pictures on the desired run the same as granted to the particular competitor named in the complaint.

If damages were asked for, the board could award damages for the period of time during which the exhibitor was denied the opportunity to obtain pictures on the desired run.

The burden of proof in a dispute as to runs would be upon the exhibitor complainant.

COMPETITIVE BIDDING

When a distributor licensing pictures by competitive bidding failed to do so theater by theater, solely upon the merits and without discrimination, an exhibitor who bid in such a situation could file a complaint for arbitration. Also subject to arbitration would be any case in which a distributor instituted competitive bidding in any competitive area except, (1) upon written request for such system by one or more exhibitors in the area; (2) upon written request of an exhibitor for a run of a picture the distributor planned to license on the same run to another exhibitor in the area; (3) to comply with a court order to so do; or (4) doing so in good faith to protect itself when it had

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reasonable grounds to believe there was a conspiracy between exhibitors in the area. Also subject to arbitration would be any situation arising whereby a distributor violated certain specific rules for conducting competitive bidding as set out in the arbitration agreement.

The burden of proof would be upon the complainant in any dispute regarding competitive bidding.

An exhibitor who submitted a bid upon invitation of a distributor would be entitled to see the winning bid if he requested such privilege in submitting his own bid.

If the arbitrators found in favor of the exhibitor, and the distributor had no right to engage in competitive bidding, they would order the distributor to cease and desist until such time as the situation would permit competitive bidding in the area. If the arbitrators found that the competitive bidding was not handled in the proper manner, they would direct the distributor to conduct competitive bidding in accordance with the provisions as contained in the arbitration agreement.

If damages were claimed and the arbitrators found in the exhibitor's favor, damages could be awarded, but only if an award was made in favor of the same exhibitor with respect to the same theater in a previous arbitration involving the same distributor on the subject of competitive bidding.

CONDITION ONE LICENSE UPON ANOTHER

Disputes arising as a result of a distributor licensing a feature on condition that an exhibitor license certain other films, or a distributor refusing to license to an exhibitor except upon the exhibitor agreeing to license certain other films, would be grounds for arbitration.

If the arbitrators found in favor of the exhibitor they could cancel the license for the films the exhibitor was forced to accept; they could order the distributor to cease and desist from refusing the exhibitor certain films except upon his taking certain other films; and if damages were asked for they could be awarded.

The burden of proof as to the complaint and damages claimed would be upon the exhibitor complainant.

CONTRACT VIOLATIONS

Controversies arising upon the complaint of an exhibitor as to violation of provisions of a license agreement entered into between the exhibitor and distributor would be subject to arbitration.

If the arbitrators found that the distributor violated any provision of the licensing agreement they would make a finding to that effect and if unperformed, would order the distributor to perform such contract. If damages were asked for by the exhibitor they could be awarded.

DAMAGES

Damages would not be awarded unless claimed in the original complaint by the exhibitor. If the arbitrators found that the complainant was entitled to damages, the amount awarded would equal the actual loss proved to have been sustained by the exhibitor as a result of the distributor's acts.

In addition to actual damages awarded an exhibitor, if the arbitrators found that the distributor acted with deliberate intent to injure the complainant, they could award exemplary damages not to exceed the amount of the actual damages so awarded.

Claim for damages by an exhibitor would be limited to the 2-year period preceding the filing of the complaint, or during a shorter period of time as may be provided by the statute of limitations of the State in which the complaint was filed.

CERTAIN PICTURES EXCLUDED FROM AGREEMENT

The arbitration draft provided that each distributor would be entitled to designate two of its pictures each year to be excluded from the agreement. Such pictures would not be subject to arbitration until they were announced by the distributor for general distribution.

CONCILIATION

Controversies which an exhibitor had not been able to settle with a distributor, including those subject to arbitration, could, if the exhibitor desired, be submitted to conciliation in order to arrive at a satisfactory settlement.

A meeting for the purposes of conciliation would be between the exhibitor, accompanied by one other person he would select, and the branch manager of the distributor, accompanied by not more than one other person. If a satisfactory settlement was not arrived at through this meeting, the exhibitor could apply in writing to the general sales manager of the distributor for a meeting with him at the distributor's home office, or at some other mutually satisfactory place, to be attended by the exhibitor and one other person he would select, and the sales manager and one other person he would select.

Neither party would be under an obligation to dispose of the matter in controversy, nor would the good faith of either party be questioned. Conciliation would not bar an exhibitor from later resorting to arbitration.

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84TH CONGRESS
2d Session

SENATE

REPORT
No. 2819

FAIR TRADE

REPORT

OF THE

SELECT COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

ON

A STUDY ON FAIR TRADE, BASED ON A SURVEY OF MANUFACTURERS AND RETAILERS

JULY 27, 1956.—Ordered to be printed

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84TH CONGRESS } SENATE { REPORT
2d Session } { No. 2819

FAIR TRADE

JULY 27, 1956.—Ordered to be printed

Mr. HUMPHREY, from the Select Committee on Small Business, submitted the following

REPORT

INTRODUCTION

Few subjects of direct concern to business—both small and large—engender more acrid controversy than that of fair trade. Many hold the principle of resale price maintenance to be un-American, a denial of due process, and a price-fixing device to guarantee retailers a profit by the elimination of price competition. Conversely, a large body of opinion holds that fair trade confers on certain manufacturers a basic form of property protection and in so doing shields thousands upon thousands of small retailers and wholesalers from predatory price-cutting, thus contributing significantly to the preservation of our free-enterprise economy. Midway between these views, is a school of thought which, while acknowledging fair trade to be an imperfect solution to a complex problem, nonetheless feels strongly that since it is the best means devised to date to accomplish a desirable economic end, it should be supported pending improvements.

Fair trade is a form of retail-price maintenance designed to prevent unfair price competition. It is concerned primarily with predatory price cutting at retail on trademarked products in free and open competition with articles of the same general class produced by others. Its objective is to prevent price cutting on trademarked products which injures the value of the manufacturers' established trademark and the stability of distribution.

Fair trade is a voluntary program; it is provided for by permissive Federal and State legislation. The manufacturer elects to fair trade and is permitted to do so as long as he does not maintain a monopoly position in the market and his product is freely in competition with that of others. Those wholesalers and retailers electing to sell fair-trade products agree to adhere to the manufacturers' fair-trade price.

California, in 1931, enacted the first State law providing for fair trade as it is known today. As amended in 1933, the California statute required all dealers who knowingly handled a fair-trade pro-

duct to abide by the minimum retail price established in the manufacturers' fair-trade contract. This statute served as a model for the 44 other States, Hawaii, and Puerto Rico which have passed similar legislation in the ensuing years. Missouri, Texas, and Vermont and the District of Columbia are the only jurisdictions that have not enacted a fair-trade law.

The Supreme Court of the United States unanimously upheld the constitutionality of the State fair-trade laws in 1936 and has consistently declined to depart from its position although subsequently there have been eight attempts to have the statutes invalidated. The Court's position is predicated on the two cases decided in 1936. In both, the Court held that fair-trade laws do not violate the due-process clause of the 14th amendment; unlawfully delegate to private parties the power to control the property of others; or confer a special privilege upon producers or owners of branded merchandise not granted to owners of otherwise identifiable goods. The Court looked to the trademark or brand name in the disposition of the commodity rather than merely to the disposal of the commodity. Justice Sutherland in writing the Court's decision emphasized that there is nothing in the various State laws to preclude a purchaser from removing the trademark or brand name from a commodity. Thus, the purchaser could separate the physical property, which he owns, from the goodwill, which is the property of another. He could then sell the commodity at any price, providing that he did so without utilizing the goodwill of the manufacturer as an aid.

Congress, in 1937, passed Federal enabling legislation, the Miller-Tydings Act, which permitted the operation of the State fair-trade laws with respect to transactions involving interstate commerce. This act was dealt a serious blow in May 1951 when the Supreme Court in the now celebrated Schwegmann case, held that the act did not extend the Sherman Act exemptions to the nonsigner clause. Such clauses provide that the selling at less than contract price by one not even a party to the contract is unfair competition and actionable by anyone damaged thereby.

The Supreme Court said that whereas the retail price maintenance scheme is authorized by State laws and therefore entirely valid in intrastate trade, that so far as interstate trade is affected the system would contravene the Sherman Act if it were not for the provisions of the Miller-Tydings Act. Therefore, the Court said it was a question as to the scope of these exemptions. Specific contracts between parties to maintain prices, it said, are clearly permissible. However, the Court held the omission of the nonsigner provision from the Federal law to be a clear indication that Congress did not intend to exempt the noncontractual form from the provisions of the Sherman Act. This decision did not affect purely local or intrastate sales but it diminished the applicability of the State laws to interstate sales by throwing out the nonsigner clause. The following year Congress enacted the second enabling statute, the McGuire Act, which specifically extended to the nonsigner the exemptions from the Sherman antitrust law. The constitutionality of the McGuire Act has been upheld by the Fifth United States Circuit Court of Appeals, and the Supreme Court has not upset this decision.

The constitutionality of their respective State fair-trade laws has been upheld by the high courts of 16 States: California, Connecticut, Delaware, Illinois, Louisiana, Maryland, Mississippi, Massachusetts,

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New Jersey, New York, North Carolina, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin.

However, the high courts of 7 States have handed down adverse decisions. In Nebraska the act was invalidated on the basis of a procedural defect and in Virginia, held inoperative because of a conflict with a subsequently enacted State antimonopoly statute. In Arkansas, Florida, Georgia, Michigan, and Oregon, the courts have ruled that the nonsigner clause violates their State constitutions. These rulings for all practical purposes vitiate the fair-trade statute and render fair-trade enforcement by manufacturers ineffective.

Characteristically, discussions of fair trade give off more heat than light because the subject of resale price maintenance inherently is not amenable to conclusive theoretical discussions. As a market place operation, moreover, fair trade presents a constantly shifting picture. In some sectors its strength may be sapped by difficulties of enforcement and by the savage competition provided by discount houses. On other fronts, fair trade may be bolstered legally by the benedictions of State court decisions. Each gain, each setback provides new ammunition to either the advocates or opponents of resale price maintenance.

It is only natural that your committee should be keenly interested in the fate of fair trade. The large number of small businesses evidencing a concern over fair trade, its present and its future, has caused your committee to follow developments in this field with close attention.

Here, however, as in many other small-business problem areas, your committee finds itself disadvantaged by a lack of concrete information. While opinions are plentiful, of facts there is a paucity. It has, therefore, been difficult for your committee to determine with accuracy whether fair trade in recent years has fulfilled its objective to a reasonable extent, or has lost ground, or has merely held its own.

To gain some firsthand knowledge on this subject which is of such vital concern to small business, your committee authorized its Subcommittee on Retailing, Distribution, and Fair Trade Practices to seek information from those best qualified to provide it—the manufacturers, distributors, and retailers who are actually practicing fair trade in the market place. Consequently, the subcommittee sent carefully designed questionnaires to virtually every fair-trading manufacturer in the United States. In the case of retailers, it would not have been feasible to poll the 1.8 million retail establishments directly. Therefore, the subcommittee developed with the cooperation of the Bureau of the Census a polling process designed to provide a trustworthy sample. The replies to the questionnaire aggregated 58 percent and 67 percent, respectively, of the number of manufacturers and retailers to whom questionnaires were sent.

This report then purports only to describe the views of the active practitioners of fair trade and to summarize—as a fact—exactly what fair traders think of fair trade in mid-1956.

MANUFACTURERS' QUESTIONNAIRE

Firms polled

Your committee endeavored to send questionnaires to every fair-trade manufacturer in the United States. Originally questionnaires were sent to approximately 1,700 manufacturers. Subsequently it

was ascertained that there had been some duplication or else more than one official was polled in the same firm. In the final analysis, it was found that the questionnaires had been sent to no more than 1,453 individual manufacturing firms. 836 firms replied; of this number, 322 presently do not fair trade. However, 131 did fair trade at one time or another but have not fair traded within the past 3 years.

Questions posed

The questionnaires [1] called on manufacturers to give information about and their views on fair-trade practices and their effectiveness in the market place today. The questions posed centered around the manufacturers' fair-trading practices and enforcement policies. The questionnaire was designed to draw out the manufacturers on the broadest possible scale about their feelings on the operation of fair trade to date and its prospects for the future.

Tenure of fair-trade programs

A striking statistic brought out by our study is the large number of firms which have been fair trading virtually the full life of fair trade. It is interesting to note that 55 percent of the 382 firms which indicated the number of years they have fair traded, stated that their resale price maintenance programs have been carried on between 16 and 20 years. Of the remaining firms, 11 percent indicated that they had fair traded between 11 and 15 years; 22 percent between 6 and 10 years; and 12 percent between 1 and 5 years.

Effect of Schwegmann decision on fair traders

A number of firms indicated that their tenure of fair trade had been disrupted by the Schwegmann decision. Some manufacturers indicated a complete withdrawal from fair trade at that time; one stated:

> Certain of the company's products have been fair traded beginning in the year 1940 and continuing until the decision by the United States Supreme Court in the case of *Schwegmann Bros., et al.* v. *Calvert Distillers Corp.* (1951). Certain products of the company were again fair traded beginning in July 1952, following the passage of the McGuire Act and continuing down to date.

Whereas other manufacturers who did not outrightly abandon their programs tacitly awaited the forthcoming legislation to restore fair trade to its former status, an executive, in discussing his firm's action, stated:

> * * * we aggressively enforced our fair trade prices until the United States Supreme Court cast serious doubt on the legality of fair trade in the Schwegmann Bros. case in early 1951. Accordingly, no effort was made to enforce our fair trade program from May of 1951 through August 1952 when the McGuire Act was enacted by Congress. Since that period we have once again maintained and enforced a fair trade program.

Leading categories of fair traded products

Fair trade merchandise accounts for a relatively small share of the total goods sold in the United States today. Even so, fair trade is

[1] See appendix A.

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prominent in a number of industries. The five leading categories of fair trade products on the basis of the manufacturers' replies are drugs and pharmaceuticals, cosmetics and perfumes, household wares, clothing and alcoholic beverages. A complete breakdown by category is given in appendix B.

Administration of fair trade programs

Only 23 of the firms which gave information on the administration of their fair-trade programs stated that they have departments which are primarily concerned with their fair-trade programs. The remaining 328 indicated that they had no such departments. In the latter cases, the firms indicated that whereas they did not maintain departments, that they did have staff members designated to handle fair trade. Usually the persons charged with this responsibility are members of the sales and/or legal department. A number of firms have indicated that their salesmen are primarily responsible for supervising their fair-trade programs. Whereas in still others—

> the whole field, administrative, and executive selling organization is responsible for the enforcement of the program. Each individual salesman and regional manager is responsible for checking and correcting violations of fair-trade prices in his territory or region.

Citing the difficulty in giving an accurate breakdown, one firm stated:

> It is very difficult to give you the exact number of people or costs of administering our fair-trade program because actually, all our salesmen are involved at one time or another as well as several of our office personnel and attorneys on a partial basis. Needless to say, the cost of enforcing our fair-trade program is quite considerable and a major item in our budget.

Indicative of an even more expanded type of operation was the description of another firm, which read:

> A special section of the sales department concerns itself primarily with the administration of the company's fair-trade program. This section works directly with the company's legal department. We have found that a relatively small number of employees is required for the administration of the program, although this varies with circumstances, such as the addition of new products to the schedules, removal of discontinued products, changes in prices, changes in the laws, etc. Enforcement is carried on by this section of the company with the assistance of the legal department as well as the use of outside attorneys in various cities throughout the country who are retained from time to time to aid in our enforcement program, including the bringing of suits where necessary. In addition, all of the company's sales representatives are under instructions to report on violations of our contracts, and we also employ shopping services in various cities in order to keep advised of the effectiveness of our fair-trade contracts.

Of those giving breakdowns of their staffs, 34 stated that they employed 10 or more people in the administration of their fair-trade

program, whereas only 9 employed between 6 and 10 persons. The majority of those employed 5 or less people in the administration of their fair-trade programs. With regard to enforcement, 59 firms employed 10 or more people, 9 employed 6 to 10, and 62 employed 5 or less.

Merchandising outlets were found to be almost evenly split between wholesalers and retailers, with 289 firms selling directly to the former and 278 to the latter and 189 firms selling to both. A mere 18 firms admitted selling directly to discount houses. Fair-trade contracts with wholesalers were placed at 163, whereas for retailers the number aggregated 279.

Enforcement of fair trade

In the past, some manufacturers consistently have required agreements with wholesalers, whereas others have required them only with retailers. Recently, a number of manufacturers, as a means of insuring that their products were not being diverted to irregular channels, such as discount houses, have begun requiring fair trade agreements with retailers and wholesalers. This situation seems to have become common in certain areas where discounting is widespread. One manufacturer, in writing on this subject, stated:

> We might mention that we do not use fair trade contracts with wholesalers, except in the New York metropolitan area, where, due to unscrupulous price practices, we had no alternative but to have our wholesalers sign fair trade agreements.

Others have indicated that their outlets are carefully controlled through "distributing through wholesalers and having fair-trade contracts with these wholesalers and retailers in each of the States having fair-trade laws."

Still others have stated that—

> they screen accounts carefully * * * sell direct to retailers through company salesmen * * * do not sell to discount houses * * * have a contract which each dealer must sign if he lives in a State where fair trade is approved.

That enforcement is, in most instances, a difficult task was borne out by the number of fair-trade agreements which manufacturers report they have negotiated with retailers and wholesalers. Firms stating that they have over 1,000 contracts with retailers numbered 54. Those placing the number of their contracts with retailers between 100 and 1,000 aggregated 46; and 42 gave their totals as between 20 and 100. Only 6 said they had fewer than 20 contracts. Agreements with wholesalers were placed by 14 firms at over 1,000; 43 stipulated that they numbered 100 to 1,000; 16 held that their totals were between 20 and 200; and 12 said that they had less than 20 contracts.

Fair-trade agreements

Among the manufacturers replying, 251 indicated that they have fair-trade contracts in 41 or more States. Those having contracts in more than 31 States but less than 41 totaled 7, while 70 have contracts in 21 to 30 States; 18 in 11 to 20; 8 in 6 to 10; and 29 in 1 to 5.

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Cost of fair-trade programs

The cost of the various fair-trade programs vary greatly with 5 firms indicating that they spent between $100,000 to $1 million on their programs; 25 from $11,000 to $100,000; and 31 less than $10,000. Chief among the expenses given were administrative, litigation, and enforcement costs.

However, in some instances it was virtually impossible for manufacturers to isolate the cost of their fair-trade programs because of the manner in which they are administered. The following example is typical of replies submitted by a number of firms concerning the cost of their fair-trade programs:

> The accounting procedures of this company are not organized so as to collect in any single ledger all the various cost elements involved in this company's fair-trade program. The figures given were derived by using actual ledger totals and, where other expense items as well were included, an estimation was made. It is believed these figures are as accurate as possible under this manner of computation and it is hoped this will be acceptable.

Major problems

In spite of the fact that 143 firms, representing a third of the manufacturers who replied to the question, indicated that they had not encountered any major problems in enforcing their fair-trade agreements, the majority stated that they have run up against a number of problems, some of which are very perplexing. The study pointed out that the major problem has been the expense of implementing fair-trade programs.

The difficulty of policing and enforcement costs were cited by 99 firms as being the major problems which they encountered. An almost equally large number, 87 firms, cited the lack of cooperation from retailers as 1 of the 3 major problems encountered and 69 cited recent adverse judicial decisions and an identical number included discount houses. Couponing practices of competitors were listed by 18 firms as a major deterrent in enforcing fair-trade agreements, and 26 firms listed reasons other than the major ones given above.

Although most of the problems cited fall within a general pattern, they necessarily differed in degree, according to the firm and industry involved. A manufacturer of photographic supplies presented the major problems which the firm had encountered in the enforcement of fair-trade agreements as being:

> (1) The desire of large organizations such as chain and department stores, discount houses, etc., to have nationally advertised quality items for loss-leader selling; (2) the difficulty and cost of enforcement; and (3) the judicial attitude toward fair trade. Other problems have been the negative attitude of the Department of Justice and the Federal Trade Commission toward fair trade; and the general lack of understanding of the purposes and benefits of fair-trade legislation and the desire of many retailers to do favors for friends by discounting to them, and industrial buying for employee organizations.

Whereas a small firm, engaged in the production of cosmetics cited enforcement cost as a major deterrent to the success of its fair-trade program. The firm's president wrote:

> The problem, as far as a small company like ourselves is concerned, is in enforcing fair-trade agreements as it would be impossible for us to police these; it would be excessively expensive for us to go into litigation to enforce them.

A pharmaceutical manufacturer cited the effect of adverse court decisions, stating:

> The major problem that we have encountered in recent years in enforcing fair-trade agreements has been the lack of confidence in the validity and stability of fair-trade laws among both wholesalers and retailers, as a result of adverse court decisions in several States. It has been our experience that whenever doubt has been cast upon the validity of a fair-trade statute in a given locality, a wave of price cutting by both wholesalers and retailers inevitably follows * * * the court decisions * * * have the effect of destroying trade laws in some States and sowing the seed of doubt as to the fairness and desirability of fair trade in the minds of educators, legislators, Government officials, and the public generally. If the constitutionality of fair-trade laws and particularly, of the "nonsigner" clause could be positively established, and especially if the fairness and economic desirability of such laws could be realized by those responsible for the molding of public opinion, we do not believe enforcement would present any problem.

Problems cited by firms which no longer fair trade

Of the manufacturers who no longer fair trade, 11 cited enforcement and litigation costs as 1 of the 3 major problems they had encountered when they fair traded. Both discount houses and the difficulty of policing their programs were ranked as second in importance by eight firms. Adverse judicial decisions were cited by 6 firms whereas lack of cooperation from retailers was given as a major problem by only 3 firms. Three of the former fair traders indicated that they had encountered no major problems while they were fair trading.

Position of fair trade in market place today

Over 75 percent of the manufacturers indicating an opinion said fair trade in their respective industries is operating satisfactorily in the market place. The number of firms taking such a position totaled 314, whereas those which feel fair trade does not operate satisfactorily numbered only 87 firms. In spite of the overwhelming number who felt fair trade operates well in their industry, the manufacturers were almost evenly arrayed in their estimate of the strength of fair trade today as compared to 5 years ago. Sharply divided in their analysis, 177 firms indicated that they found fair trade weaker, whereas 90 firms found it stronger and 78 indicated that they felt there was no appreciable change. The reason invariably cited for the deterioration of fair-trade's status since late 1950 or early 1951 was one or more of the problems encountered by manufacturers.

A houseware manufacturer, holding that fair trade is stronger, stated that fair trade in his industry—

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operates well in the market place, although only a few manufacturers in such industry fair trade their products or maintain an effective enforcement program. The company believes, that on the whole, fair trade is now stronger than 5 years ago. In order to make fair-trade enforcement effective, it is believed that the State fair-trade laws should be amended to provide for substantial fines and other effective sanctions for violation thereof.

Whereas a firearms firm in declaring that fair trade is weaker today said:

> As previously indicated, it is our opinion that fair trade in our industry operates well in the market place. We feel that it is weaker than it was 5 years ago for the reasons outlined. If the Federal law were amended to specificially permit fair trade in interstate commerce rather than to enable States to enact statewide fair-trade laws, many of the difficulties now encountered might be eliminated.

An electrical appliance manufacturer, with an extensive fair-trade program maintained that:

> Although obviously not a perfect solution, fair trade has worked reasonably well in the appliance business, and is stronger now than it was 5 years ago. Changes in the fair-trade acts which would help overcome the problems set forth above, would make enforcement more effective.

Taking exception to the position above another housewares manufacturer said:

> We believe that fair trade in our industry is not operating as well in the market place as it was 5 years ago. We believe that more effective fair-trade enforcement could be and should be obtained through changes in fair-trade legislation. However, we do not feel that we have given adequate consideration to the various ramifications of the problems so as to be in a position to offer concrete suggestions for legislative changes at this time.

A silverware producer, in holding fair trade weaker, cited the Schwegmann case as the point of beginning difficulties. The firm's president said:

> In like manner it is the opinion of our executives that fair trade operated well in the market place up to and until the Miller-Tydings Act was weakened by the United States Supreme Court decision in *Schwegmann* v. *Calvert Distillers Corp.* (1951). The complete collapse of fair trade which followed this decision and continued until the enactment of the McGuire Act saw the beginning in the shift of distribution of our products referred to above. The reinstitution of fair trade, while it slowed down this shift did not prevent its increase which in our opinion is due to the difficulties of enforcement listed above, and in fact throughout this period since the McGuire Act we have felt that despite our efforts we have not been able to keep pace through our enforcement

> and particularly on behalf of the larger and more powerful violators.

In agreeing that fair trade is weaker, an electrical appliance firm stated:

> * * * Unquestionably, fair trade is much weaker today that it was 5 years ago, 1 year ago, or for that matter 1 week ago. Unless something is done, as it now is going, it will cease to exist. I believe the most effective change in making fair trade enforceable is rather simple. First, the violator, if he is found guilty should be obligated to pay lawyer's fees and court costs for the manufacturer bringing suit. Secondly, any manufacturer under these conditions that does not enforce his fair-trade contract should be deprived of the privilege provided by law.

In the same vein, a phogotraphic supply manufacturer called for new Federal legislation, saying:

> * * * we believe that fair trade, as we know it today, is worse than no fair trade at all. It has resulted in a serious discrimination against those retailers who have refused to meet price-cutting competition * * *. Federal fair-trade legislation is needed to provide a basis for a uniform fair-trade program. This legislation should provide for a means of enforcing fair trade without astronomical expense to the manufacturer.

Products sold in non-fair-trade jurisdictions

Of the fair-trade manufacturers indicating their policies, 284 stated that they either suggest retail prices for or attach price tags to their products sold in other than fair-trade States; 54 stated that they did not suggest prices in these States. Among the non-fair-trading manufacturers, 53 stated that they recommend retail prices for their products whereas only 6 said they did not.

The moral aspect of suggested retail prices in non-fair-trading areas was mentioned by some manufacturers as being an effective aid in maintaining fair-trade prices in these areas. One firm averred:

> In States where fair-trade contracts are not valid, our distributors have been able through moral suasion to get the majority of dealers or retailers to follow suggested resale prices.

Manufacturers' future plans for fair-trade programs

With regard to their fair-trade programs, 266 anticipated no change; 38 had no definite plans and only 9 indicated that they expected to expand their programs; whereas 7 said they expect to increase their enforcement. However, 18 firms stated that their plans call for abandoning their fair-trade programs.

The views of those anticipating no change in their programs were summed up concisely by one manufacturer who maintained:

> * * * We will continue to fair-trade our products in those States having enforcible fair-trade laws. We will continue to make all reasonable efforts to enforce the fair-trade contracts which we have entered into, and, in general, to follow

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> a policy of fair trade and nondiscriminatory pricing. We will refuse to sell our products knowingly to dealers who engage in price cutting and will take necessary and reasonable legal action against price cutters.

All manufacturers were not quite so positive about their plans. And, to a lesser degree usually it was the small manufacturer whose plans were in a state of flux. Said one of these manufacturers:

> Our future plans on the fair-trade program now are in a situation of treading water and letting the big companies take the lead in any direction they see fit to go.

Those who expect to discontinue their programs indicated that the difficulty of enforcing their programs coupled with litigation expenses were the major factors influencing their decisions. Those with no definite decisions about the future evidenced concern over the effectiveness of existing legislation as well as the difficulties imposed by enforcement and litigation.

Of the 74 manufacturers who no longer fair trade, only 3 indicated that they no longer believed in the principle of fair trade, whereas 23 cited the expense of litigation and enforcement coupled with the difficulty of policing as the major obstacle to their programs.

Probable effect of repeal of fair-trade laws

When asked about the probable effects on their companies and industries as a whole should the Miller-Tydings and McGuire Acts be repealed, 231 firms felt that there would be substantial adverse effect upon their companies specifically and their industries as a whole. One manufacturer voiced apprehension over the status of small business, saying:

> We would consider that very serious effects would be encountered by our firm, as well as other small industries, should the Miller-Tydings Act and the McGuire Act be repealed. The reason for our concern is that big business with its unlimited capital and huge resource, could stand a program of narrow margins of profit should cutrate prices prevail in the wholesale and retail field, whereas small businesses would be seriously crippled and perhaps wiped out, in view of the present standard of inflation now prevailing in this country, and with the cost of doing business going up percentagewise a large group of small businesses would be wiped out should the two acts heretofore mentioned be repealed.

Still another executive pointed up the threat to small business by stating that in his opinion:

> * * * repeal of all trade laws in various States will definitely wipe out the largest percentage of small business, as big business with its monopoly control of raw materials, which is the largest part in the cost of manufacture of any merchandise, will eventually squeeze small businesses out. On account of heavy overhead expenses existing in most small industries today caused by the inflationary movement existing today, it would absorb the small and narrow profit, and result in a squeeze that many small-business men would be unable to cope with.

A third manufacturer, speaking on the basis of past experience with price cutting, stated:

> Along in the early twenties, when we were really going places, the ——— Co., of Kansas City, advertised our product for 3 days at 39 cents. They never did cut prices after that, but our volume in the territory covered by the Kansas City Star dropped by a half million dollars and we were never able to get it back. A woman would ask for our product. The clerk asked her 50 cents and she would say, "Why, ——— advertises it for 39 cents"—with the result that the dealer took his stock of our goods off his shelf and put it in the back and sold it only on call to those who were willing to pay full price.
>
> Just recently I had a visit in my home with the proprietor of the Kansas City firm. He made the remark, "You were right all the time. If it wasn't for fair trade we couldn't stay in business, our margin of profit is so small."

Still another manufacturer alleged that should the fair-trade laws be repealed his firm's products "would not be handled by hundreds of thousands of service stations, garages, and car dealers." He based this presumption on the recent experience of his firm in the Philadelphia area where price cutting by one firm "ruined our business." In describing the experience he wrote:

> * * * a pathetic experience of our company in Philadelphia in 1952 * * * when fair trade was not operative * * * a small tire company sold our products at ridiculously low prices; at one time selling for 15 cents a product that other stores sold for $1.50. * * * For a period of many months, he advertised our products at prices way below our cost, ranging from one-tenth to one-third of the price at which they were sold in other stores. * * * We sent scores of "shoppers" to his store to purchase our products, as advertised, and found that he told the "shoppers" that he had run out of stock on our brand but had a ——— brand, which he claimed our company made, and which he guaranteed was identical in quality to our product. * * * Both the Better Business Bureau of Philadelphia and our company reported the condition to the Federal Trade Commission, and while an investigator spent literally scores of hours at our office and in Philadelphia on this case, they did not prevent the unlawful practice of this company. It was not until fair trade was restored under its present legislative condition, that we were able to stop this unethical practice. * * * During the period that they were selling our products at from 15 cents to 25 cents as compared to $1.25 that other stores were charging, our company spent over $100,000 on television programs in Philadelphia * * *.

A drug manufacturer indicated that he thought his industry might not be appreciably affected by repeal of the enabling acts. However, he cited the probability of increased loss-leader sales as a threat to small business, stating:

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We feel the repeal of the Miller-Tydings Act and the McGuire Act would not so seriously affect our company but we do feet that it would have a very serious effect on the retail drug industry as such—particularly the independent dealer. A repeal would probably be helpful to the chains in attracting business away from independent druggists who are not in a position to advertise and bring traffic into their store through "loss-leaders" prominently displayed in newspaper copy.

Nevertheless, the fair-trade laws are still of very definite value to us in the merchandising of our products. Should the Federal fair-trade law be repealed, we feel very strongly that it would definitely hurt thousands of small, independent dealers who would find it impossible to compete with powerful chain groups and major retailers who use the most successful, best-selling items to bring people into their stores by selling the product at little or no profit and sometimes at a loss in profit.

It naturally follows that we would consider a repeal of the Miller-Tydings Act and the McGuire Act a catastrophe. We believe such a repeal would be followed by a return to the "jungle warfare" of the early 1930's, with its consequent evils of substitution, misrepresentation and destruction of faith and value in trademarks to an extent that would eventually necessitate the enactment of legislation similar to that repealed.

The probability of widespread price wars, should fair trade be abolished, was further emphasized by a manufacturer who stated:

The repeal of the Miller-Tydings Act and the McGuire Act would immediately cause considerable confusion in the trade and result in widespread price cutting on the part of the chainstores and catalog houses.

Voicing the same opinion, a household-wares manufacturer said:

It is believed that the repeal of the Miller-Tydings and McGuire Acts would result in lengthy, unrestricted price wars as a result of which many of the smaller dealers handling the company's products and other housewares items would be forced out of business; and the sale of such products would tend to be monopolized by large chainstores, department stores and discount houses; the loss of widespread distribution through many small retail dealers would reduce the company's business, result in unemployment for its workers and depreciate the company's investment in productive facilities. It is believed that similar consequences would be felt by other producers in the housewares industry and particularly those producers, who, like the company, fair trade their products in order to achieve mass distribution thereof through assuring smaller dealers a reasonable return upon the sale of the products.

Similarly, another manufacturer cited the concentration of retail outlets in mail-order houses and large retail firms. He said:

> * * * the repeal of the fair-trade legislation would have a depressing effect on our company and the industry as a whole. We are quite certain that it would have a distinct tendency to eliminate many of our smaller retailers and tend to concentrate the business in the hands of the mail-order houses and the large retail outlets. It is felt that this would tend to decrease the potential market for our products.

Some favor repeal of fair-trade laws

Not all firms felt that the repeal of the fair-trade laws would have an appreciable adverse effect on their operations. There were 33 firms that felt there would be only a slight adverse effect in their industries, whereas 67 felt that there would be no effect and 14 actually felt their industries would be better off without fair trade.

In the latter category, only a few gave any reason for feeling their industries would be better off without fair trade. Several indicated opposition to any type of Government regulation of commerce, whereas one manufacturer stated he thought the repeal of the Federal statutes would result in "keener competition, better sales efforts and service on the part of retailers. Some chiselers will go broke."

Another cited the lax enforcement provisions of the fair-trade laws as a reason for getting rid of the statutes. Said he—

> A small manufacturer, such as ourselves, is directly benefited by fair trade if there are any teeth in the law. However, under its present enforcement value in most States, we consider it sheer mockery and feel that it would be best if it were discontinued.

Withdrawals from fair trade

Pointing up the voluntary aspect of fair trade, 23 firms indicated that they had dropped 1 or more of their products from fair trade during the past 3 years, whereas 37 indicated that they have withdrawn all products from fair trade within the past 3 years. These figures coupled with those on the number of years firms have fair traded indicated that withdrawals are running ahead of those entering fair trade.

The withdrawals in most cases were due principally to the problems encountered by manufacturers. The effect of the abandonment of fair trade on commodity sales was not always readily ascertainable, primarily because of the short lapse of time. Of the 60 firms which have discontinued fair trading 1 or more of their products within the past 3 years, 32 did not indicate the effect on their business; 22 firms felt that there had been no effect; 5 found that sales had increased; and 1 stated that sales had decreased.

The following excerpts register briefly the majority feeling of firms which, finding the problems of fair trade intolerable, abandoned it:

> As a practical matter, fair trading of the company's * * * products has been discontinued in at least one State through the lack of enforcement of its fair-trade agreements. The discontinuance of the fair-trade agreements in that State has had no appreciable effect on the sales of the company's products. The sales of our products in that State have increased. However, we believe that the increase in sales has been due to increased advertising and promotional activities on the

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part of the company rather than a discontinuance of the fair-trade agreements.

The sales of the products removed (from fair trade) have increased, but we have no reason to believe that this increase has been at a faster rate than would have been the case if we had continued to fair-trade them. In the long run, however, if our dealers lose interest in such items because of lack of profit, we may lose our distribution and sales may decline. In addition, there is a tendency on the part of retailers to recommend products made by others that may carry more profit to them, and this could hurt our sales.

RETAILERS' QUESTIONNAIRE

Sample of retailers

The committee's limited facilities precluded a direct polling of the 1.8 million retail establishments throughout the Nation. Therefore, in order to obtain their thinking on fair trade, your committee employed a sampling process scientifically arranged by the Bureau of the Census.

The questionnaire [2] was designed specifically to facilitate answering by the recipients in order to provide a maximum coverage of fair trade in the retail field with a minimum of exertion on the part of retailers. It required no detailed answers as did the manufacturers' questionnaire. The response ran ahead of that of the manufacturers and was at a rate of 67 percent of the total. Even so, not every retailer answered every question fully.

Percentage of total sales accounted for by fair-trade products

Of the retailers replying, 29 percent indicated that they do not carry any fair-traded merchandise; 35 percent stated that fair-trade products account for up to 10 percent of their sales; 15 percent indicated that fair-trade products account for between 10 and 50 percent of their sales; and 10 percent said that they comprise the majority of their sales. The remaining 11 percent failed to answer this question.

After eliminating the 11 percent which failed to give an answer, a further breakdown of the replies to this question, showed that nearly a third of the remaining firms did not deal in any fair-traded commodities and about 40 percent of the others indicated that such products accounted for less than 10 percent of their sales. Those stating that fair-trade products made up between 10 and 50 percent of their sales amounted to 16 percent of the total, but only 11 percent estimated that fair-trade products accounted for more than 50 percent of their sales total. Hence, on the basis of this sample, it is seen that in over 70 percent of the retail establishments, fair-traded commodities account for less than 10 percent of the dollar-sales volume.

Leading categories of fair-traded products

Other than the largest category of fair-trade articles, cosmetics, the other leading products in order of relative importance were electrical appliances, drugs and pharmaceuticals, jewelry, auto accessories, and hardware. Still other major items were food products, cameras, sporting goods, clothing, alcoholic beverages, and books. A breakdown by categories is given in appendix D.

[2] See appendix C.

Some discontinued fair-trading

In response to a question on the subject, 8 percent of the retailers indicated that they had discontinued fair-trading one or more products. 56 percent of the firms that have dropped one or more products gave lack of or poor enforcement by the manufacturers as the primary factor influencing their decisions. Approximately 16 percent indicated that they no longer fair-traded certain products because the manufacturers had removed the product from fair trade. These were the only two major breakdowns of reasons given. The remaining 28 percent gave various reasons, for example, 7 percent cited the difficulty in selling the product; 6 percent cited high prices of the products; 13 percent gave various reasons and 2 percent did not indicate any reasons.

Fair-trade agreements

The retailers, answering a question in point, indicated that 52 percent were not signers of a fair-trade contract. Of the 48 percent who stated that they are signers, 56 percent of that figure indicated that they had contracts with manufacturers; 28 percent said they had signed agreements with wholesalers; and 16 percent said they had signed agreements with both.

Approximately 65 percent of those having agreements with manufacturers stated that they were with 5 or less firms; 15 percent indicated that they had agreements with between 5 and 10 firms and 20 percent said that they had over 10 agreements with manufacturers.

Those having contracts with wholesalers overwhelmingly indicated they had five or less such agreements. Those in this category accounted for approximately 92 percent of the total, the remaining 8 percent had contracts with between 5 and 10 wholesalers, and those who indicated they had contracts with over 10 wholesalers numbered less than 1 percent.

As shown above, over half of the retailers responding to the question indicated that they are not signers of fair-trade agreements. This is no indication of opposition to the agreements, for, as 1 dealer stated, when reporting that he had signed only 3 agreements, "I would sign more if the manufacturers would send them." This is significant inasmuch as it indicates that a large proportion of the firms selling fair-trade merchandise have not negotiated any type of fair-trade agreements. Apparently the majority have not been requested to do so; although they are legally bound in most jurisdictions where there is a single signer.

Not all retailers acquiesce readily when asked to enter into a fair-trade agreement. The feeling of a number of retailers was set forth by one merchant who stated, "we have signed only those agreements which are presented by manufacturers proving conclusively that they have and will enforce them."

Actions taken by retailers to combat discounters

Over 57 percent of the retailers replying to this question stated that at some time during their operations a competitor has sold at a discount a product which they fair trade.

When queried about the combative actions which their firms have taken, 90 percent of the total replied. Of that number, 21 percent indicated that they have written to the manufacturer; a like number have written to the wholesaler. Slightly fewer, 20 percent, lowered

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prices to meet competition, whereas 15 percent took no action at all. 9 percent notified the manufacturer that unless he took action against the discounter that they would sell his product at a discount; and 7 percent discontinued carrying the product; whereas only 4 percent initiated court action against the discounter; 3 percent indicated various other actions.

Retailers sometimes encountered difficulties in their efforts to force others into abiding by fair-trade prices. One retailer, in describing his experiences, stated—

> After lowering prices to meet competition we were enjoined by court action. We now sell at fair-trade price even though competition sells below. However, we have appealed the injunction.

Others indicated that they continue to maintain their fair-trade prices and eventually the discounters fell into line. Typical of such reports is the following: "Ignored competition and held to contract. Competition soon resumed pricing of merchandise." This rather solubrious result, however, was not obtained by many retailers under similar conditions. That price-cutting is not abated easily, once begun, is borne out by the numerous testimonials that it is a major problem encountered by both retailer and manufacturer.

Position of fair trade in the market place

As do the manufacturers, the retailers find fair trade operating well in their areas. More than 60 percent of the retailers writing about the status of fair trade stated that it operates satisfactorily or very effectively in their markets. However, there was a considerable departure from this position by 55 percent of the retailers who expressed the opinion that fair trade's position today, vis-a-vis its strength of 5 years ago, is weaker. The reasons given seldom varied; they ran the gamut of those heretofore given, including the well-known factors: the Schwegmann decision and its resulting price wars; the subsequent adverse court decisions; and ineffective enforcement.

The retailers indicated that in order to make fair-trade laws more effective, manufacturers should increase their enforcement and refuse to sell violators of their fair-trade contracts.

A men's furnishing store proprietor cited the need for an educational program on fair trade, stating, "Educate consumers in addition to retailers on the safety and protection of legitimate merchandise that has a consistent identity."

A number of retailers indicated that what they feel is needed to make the fair-trade laws more effective "is a Federal fair-trade law that can be enforced throughout the 48 States" or Federal enforcement of the existing fair-trade laws.

Retailers cite effective enforcement programs

The retailers cited 426 different manufacturers in response to a question asking which manufacturer of fair traded products, handled by the firms, has the best enforcement program. The most frequently mentioned was an electrical appliance manufacturer which was commended by approximately 60 establishments as having the most effective program. However, only slightly more than 50 manufacturers were cited by 2 or more retailers.

The ten firms receiving the greatest number of commendations as assiduous enforcers of their fair-trade programs represented varied

types of manufacturers. Their products fell in the following categories: Automobile accessories; cameras and photographic supplies; cosmetics and perfumes; drugs and pharmaceuticals; electrical appliances; hardware; and household wares.

The electrical appliance manufacturer which was ranked first by the retailers has been engaged in fair trade since 1938. The firm maintains a fair-trade department which is assisted with the company's fair-trade program by firm salesmen and general counsels who are retained in areas where there is litigation. This firm distributes entirely through wholesalers and has a fair-trade contract with each of its outlets. Presently the firm has 1,200 fair-trade agreements with wholesales and over 250,000 with retailers in jurisdictions having fair-trade laws. Presently its fair-trade program costs the firm approximately $750,000. In those jurisdictions where there are no fair-trade laws the firm suggests retail prices to retailers. The manufacturer stated that fair trade is weaker now than 5 years ago. With regard to the Federal enabling legislation the firm stated:

> If the Miller-Tydings Act and McGuire Act are repealed or seriously weakened by adverse court decisions, we are afraid that there will be violent price wars with a few of the strongest, most financially powerful retailers and discount houses emerging in monopolistic position of dominance over the retailing of appliances. While price wars initially move a lot of merchandise, they also make it absolutely unprofitable for the great majority of dealers to continue handling the price-cut merchandise so the long-run effect in the weakening or destruction of the fair-trade laws will be to develop retailing concentration and monopolies.

None of the 10 firms has fair traded less than 10 years and only 1 has fair traded less than 15. The estimated value of sales for the various firms' fair traded products during 1955 varied between $40 million and $140 million. Only 3 of the 10 manufacturers maintain a special department to deal with its fair-trade program. In the remaining firms, fair trade is primarily the responsibility of the sales department and the legal staff. Seven of them distribute their products through wholesalers and 3 distribute theirs through both wholesalers and retailers. The costs of the manufacturers' fair trade programs range from $15,000 to nearly $900,000 per annum for the 7 firms indicating their expenses. Each of the 10 suggests a retail price for its products in jurisdictions where there are no fair-trade laws. Each of them expects to continue fair trade. Only one of the firms has voluntarily withdrawn a product from fair trade within the past year. Six of the firms found fair trade weaker than 5 years ago.

Perhaps the best explanation of the effectiveness of these 10 manufacturers' programs is the fact that each feels fair trade enhances his position in the market place. The thinking of the manufacturers is best described by the statements of several of them regarding the detrimental effect on business should the fair-trade laws be repealed.

A drug manufacturer who sees fair trade as a bulwark against price-cutting stated:

> If the Miller-Tydings Act and the McGuire Act were repealed, the good will associated with the company name and many of its products which are trademarked would be injured

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> because many of our products would no doubt be used as loss-leaders and be cheapened in the eyes of the public. We believe we would experience a loss in sales on many products, because independent druggists would cease to push the sale of products which they must either sell higher than their competitors who are using the products as loss-leaders or sell them at no profit, which, of course, they would not do.

A similar view was expressed by another of the 10 who said:

> The sales management responsible for fair-traded products believes that its products, because they are nationally known, would probably be utilized as loss-leaders by some outlets. Consequent effect of this is that other resellers may find our lines less attractive and would tend to reduce the number of outlets for our products and result in a decrease in overall sales.

Another saw the threat of distribution as a very real one if fair trade were abolished and stated:

> * * * we believe industry sales would materially suffer. So far as our own products are concerned we are convinced that cut-rate merchandising of them would substantially impair the tremendous business investments and good will created by our advertising and earned by the products themselves; that it would destroy the broad base of our distribution pattern which makes our products widely and readily available through thousands of relatively small independent retail outlets which are the backbone of such a merchandising system; that elimination of fair trade would destroy the only practical method available to protect these small businesses from competitive injury or extinction threatened by the predatory price cutting of their larger and more powerful competitors who can stand and will use our products to bring traffic into their stores to sell other merchandise. In short, the many reasons set forth in committee reports which led Congress to pass the McGuire Act in 1952 are still valid and persuasive.

Briefly, these statements highlight the benefit that the manufacturers feel they and those handling their products derive through their fair-trade programs. This type of thinking on fair trade has undoubtedly has much to do with the type of fair-trade program they employ and these are the programs which retailers appear to respect and want to see implemented by other manufacturers.

Retailers "push" fair-traded products

It should be of particular interest to manufacturers that over half of the retailers (56 percent) indicated that it is their policy to push the products of manufacturers who have active fair-trade programs. This should provide an even greater incentive for the somewhat lackadaisacal enforcer of fair-trade contracts and by the same token fuller participation by all fair traders in enforcing their programs. For this practice clearly indicates that retailers not only appreciate effective enforcement but that they want it and, in order to encourage it, are willing to give preference to the products of vigorous fair

traders. This position is epitomized by one appliance dealer who stated: "We naturally protect ourselves by pushing the products whose distributors give us the best franchise protection."

Still another retailer cited the advantage of pushing well-advertised fair-traded merchandise by alleging that "it takes less effort to sell and the customer is more easily satisfied."

A jewelry store proprietor pointed up the inability of small-business firms to survive price cutting and justified his pushing fair-trade products by avering that "it is the only way a small dealer can compete with the large mail-order houses."

An independent drugstore owner called fair trade the "only salvation for the life of the small retailer. If he does not support the manufacturer of fair-trade products he has no future to look to."

Commenting on the unfair competition afforded by discounters, a sporting goods firm stated that "we do not push any product sold in discount catalogs * * * we have discontinued lines which keep appearing in discount catalogs."

Some retailers evidence some qualms about featuring fair-trade products as a means of pushing the items. For, as one furniture store owner alleged—

> when a merchant features fair-trade items and maintains the price, he creates the customer desire for the item and leaves the way open for discount houses to make the sale.

Probable effect of repeal of fair-trade laws

With regard to the probable effects on their industry, should the Miller-Tydings and McGuire Acts be repealed, over 55 percent of the retailers felt that such a repeal would have adverse or disastrous effects on their businesses. Whereas, 31 percent did not believe that it would have any effect on their businesses; 8 percent felt that they would be better off without fair trade; 3 percent indicated various other opinions; and 3 percent had no opinion on this matter.

Those feeling their businesses would be adversely affected invariably cited their inability to stand up against cutthroat price wars. Said one hardware and furniture dealer, repeal of the fair-trade laws "would mean goodby to small business and hurrah for the big—and there goes the backbone of the American economy." Along the same vein a bookdealer said repeal of these laws would be—

> disastrous to the smaller retail trade. We have no other weapon to fight the unprincipled price cutter most of whom are large concerns with large financial backing who delight in taking a cut on a well-known item and surreptitiously make it up on other merchandise which has not been so well advertised.

Another retailer saw the inevitable price wars as forcing the discounters out of business. He stated—

> a flurry of cut-price sales by the weaker outlets who are unable to get and hold trade in legitimate ways would hurt our business and be very painful while it lasted. Eventually they would put themselves out of business but everyone would be hurt in the process.

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A similar view was taken by a photographic supply dealer who said—

> Temporarily prices would become more competitive. In the long run, however, so-called discount houses would be driven out of business and competitive prices would settle at a fair level.

But the majority of the small firms did not see themselves surviving such tactics; one alleged—

> It would be a matter of time until I would be out of business due to the fact that I could not compete with big stores and discount houses. They have the money to cut and juggle prices until the small retailer is forced out.

Some merchants saw as an ancillary aspect of the price wars the diminishing of services offered by the retailers. One jeweler said—

> It would create a deplorable situation of bait advertising and would probably create a situation that would eliminate profits and the ability to properly service customers.

Still others saw in the loss of the fair-trade laws a decline in business ethics. Wrote one—

> Being a small retail businessman—if repealed—being of limited capital—I just couldn't keep up with that fast misleading cut-rate, rat-race competition that we had before fair trade. I would be forced to sell out—because if there is one thing that fair trade has done—it has at least given the poor boy (and I am one of them) the incentive to go into business on a fair, clean, and respectable basis, beneficial for himself and the community he has the honor to serve.

Those who envisioned little effect, if any, on their businesses primarily based their position on the fact that "a very small amount of our merchandise is fair traded."

Still others felt that their credit and service facilities would continue to stand them in good stead. One electrical-appliance dealer expressed this view when he stated—

> The effects would not be too severe, because we service what we sell. We will stand for manufacturers suggested retail price and back our sales by service. The consuming public is learning fast that a bargain without service is no bargain at all.

SUMMARY

The manufacturers, as proponents of fair trade, naturally have more than a passing interest in having it operate effectively. They wrote unsparingly of its deficiencies. These centered around the rife expansion of discount houses; the difficulties manufacturers are having enforcing their programs; and the considerable expense that many of these enforcement programs and allied litigation entail. The manufacturers overwhelmingly maintained that if fair trade is to be more effective it must be strengthened. The majority thought this could best be done by providing for more stringent enforcement provisions, e. g., by putting teeth into the fair-trade laws such as making

violators guilty of a misdemeanor and subject to fines and/or imprisonment. A number of other firms indicated that it is only the nonsigner clause that needs revision. Singularly these views also were largely those of former fair trade manufacturers who answered the questionnaires.

Still others felt that revisions of the State laws will not meet the requirements for making fair trade effectively operative. These indicated that Federal legislation, designed to supplement the existing Federal laws or revamp them entirely, is needed. These suggestions included, among other things, providing penalties for fair-trade violations and a national law providing that a manufacturer's price becomes a part of his product, "in the sense that any unique feature of his product is covered by a patent." The latter recommendation was predicated on the belief that "the laws covering patent infringements are less easily violated than are the prices under the fair-trade acts."

The majority of retailers, in the 45 States which at some time in the past 25 years have enacted fair-trade laws, indicated a desire for fair trade, even those who were not greatly affected by its operation backed the principle and in some instances, firms going out of business maintained that had more stringent fair-trade laws existed they might have continued their operations. One such retailer stated:

> After being in business for 58 years we have gone out of the retail business * * * unless something is done to allow legitimate merchants to operate at a profit, the public will suffer by being victimized by unscrupulous dealers * * * we do not care to be a part of this rat race which will eventually end up in chaos. To be a successful merchant you must sell good merchandise, give good service and sell at a fair profit. Without a fair trade properly policed by both the manufacturer and wholesaler all that will be left selling the consumer will be the connivers, etc. We want no part of it.

Although proponents of the fair trade principle, the majority of the retailers indicated a dissatisfaction with its implementation under existing laws. Some called for an all-out educational program on the part of manufacturers and wholesalers alike and the majority called for stricter enforcement at all levels, and some indicated revisions of the existing laws or the enactment of new ones are necessary if enforcement of the system is to be practicable.

In general, the manufacturers and retailers alike favor fair trade and intend to continue their programs. However, they feel that fair trade is losing ground and in order to combat this they indicate the necessity for a stronger fair-trade law if their fair-trade programs are to be successful.

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APPENDIXES

Appendix A

Questionnaire on Fair Trade Sent to Manufacturers

1. How long have you fair traded one or more of your company's products?

2. What products are covered by your fair-trade program? (*a*) What was the value of sales for your fair-traded products for the years 1953 and 1954, respectively? (*b*) What is the estimated value for 1955?

3. Do you have a department which is primarily concerned with your fair-trade program? (*a*) How many employees are involved in the administration of your program? (*b*) How many are involved in its enforcement?

4. Do you sell directly to retailers? (*a*) Do you distribute through wholesalers? (*b*) Do you sell directly to discount houses? (*c*) Do you have fair-trade contracts with wholesalers? (*d*) With retailers? (*e*) How many with each?

5. Do you have fair-trade contracts in effect in all fair-trade States? (*a*) If not, please indicate in how many States you have them. (*b*) Please enclose a sample copy of each kind of contract.

6. What was the cost of your fair-trade program for the years 1953 and 1954? (*a*) What is the estimated cost for 1955? (Under cost please give a breakdown, where possible, of the various factors involved, e. g. administration, enforcement, litigation, etc.)

7. What do you consider to be the three major problems which you have encountered in enforcing fair-trade agreements? (*a*) What other problems did you encounter?

8. In States where you do not have fair-trade contracts, are retail prices suggested for products which you fair trade in other States?

9. What are your company's future plans for its fair-trade program?

10. What do you consider would be the probable effects on your company and the industry as a whole should the Miller-Tydings Act and McGuire Act be repealed?

11. In your opinion does fair trade in your industry operate well in the market place? (*a*) Is it stronger or weaker than 5 years ago? (*b*) What changes, if any, do you feel are needed in the fair-trade laws to make enforcement more effective?

12. Have you discontinued fair trading any products within the last 3 years? (*a*) If so, please identify the products and describe the effect this development has had on their sales.

APPENDIX B

Categories of products that were covered by fair-trade programs during 1953–55 (showing the number of manufacturers fair trading each product)

Products	Years		
	1953	1954	1955
Drugs and pharmaceuticals	77	78	75
Cosmetics and perfumes	55	55	55
Household wares	40	39	40
Clothing	25	24	25
Alcoholic beverages	23	21	21
Tobacco products (pipes, etc.)	19	19	19
Sporting goods	19	19	19
Cameras and photographic supplies	17	17	16
Electrical appliances	16	16	16
Jewelry (watches, pens, etc.)	14	14	14
Books	13	13	13
Chemicals	12	12	12
Automobile accessories	9	8	7
Food	5	5	5
Hardware	5	4	4
Others	39	38	38

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APPENDIX C

QUESTIONNAIRE ON FAIR TRADE SENT TO RETAILERS

Form FT-3

UNITED STATES SENATE
Select Committee on Small Business
Washington 25, D. C.

Survey Conducted by Subcommittee on Retailing, Distribution and Fair Trade

FAIR TRADE QUESTIONNAIRE

Name and Address

(Correct any error of name and address)

CONFIDENTIAL - Your replies will not be used for investigation or regulation of your firm. In order to simplify reporting, most of the inquiries may be answered by check-marking the appropriate answers in the space provided.

INSTRUCTIONS: Please answer all inquiries and return the completed form within 10 days after receipt. Answers should pertain only to activities of the establishment located at the address indicated. If additional space is needed, use page 2 for continuation and enter the item number on the continuation page for each entry. A postage prepaid envelope is enclosed for your use in returning the completed form.

Item No. DESCRIPTION

1. Check for each of the years indicated, the appropriate column which most nearly indicates the percentage of total sales of the establishment identified above, accounted for by fair traded products:

Year	Percentage of total sales accounted for by Fair Trade Products			
	If "None" check (✓) below	more than 0 but less than 10%	10% but less than 50%	50% and over
1953				
1954				
1955				

2. Check below the following categories of fair traded products which you carry. Fair traded products carried by your establishment, which do not fall into the categories specified below, should be indicated on page 2:

Fair traded products which are now sold at this establishment:

Products	Check(✓) below	Product	Check(✓) below
Alcoholic beverages (packaged)		Electrical appliances	
Automobile accessories		Food products	
Books		Hardware products	
Cameras and photographic supplies		Jewelry, inc. fountain pens	
Clothing		Sporting goods	
Cosmetics		Other products	
Drugs and pharmaceutical products		(specify on page 2)	

3. List below the fair traded products, if any, which you previously sold, but no longer carry, and give the reasons for discontinuing these products:

Product	Reason for Discontinuance

4. a. Are you a signer of a fair trade contract? Check one: Yes ☐ No ☐

b. If answer is "yes", indicate in the spaces provided, the number of agreements entered into with manufacturers, and the number with wholesalers.
Number of agreements entered into with.....Manufacturers ☐ Wholesalers ☐

5. a. Have any of your competitors ever sold any of the products at discount, which you sell at fair traded prices? Yes ☐ No ☐

b. If answer is "yes", what action have you taken in an effort to enforce fair trade:

1. Written to manufacturer? Yes ☐ No ☐
2. Written to wholesaler? Yes ☐ No ☐
3. Lowered your prices? Yes ☐ No ☐
4. Initiated court action? Yes ☐ No ☐
5. Notified manufacturer that you would sell at a discount if action wasn't taken Yes ☐ No ☐
6. Other action? (specify) _____

more

QUESTIONNAIRE ON FAIR TRADE SENT TO RETAILERS—Continued

- 2 -

Item No.	DESCRIPTION

6. a. What is your opinion of how effectively fair trade operates in the area in which this establishment is located?

Check one:

Ineffective ☐ Satisfactory ☐ Very Effective ☐

b. In your opinion, is fair trade stronger, weaker, or the same as 5 years ago in this area?

Stronger ☐ Weaker ☐ Same ☐

c. What changes, if any, do you feel are needed to make the fair trade laws more effective in this area? _____

7. a. Which manufacturers of fair traded products handled by you in this establishment do you consider to have the best enforcement program?

Manufacturer _____ Manufacturer _____

b. Do you have the policy in this establishment of "pushing" products which have an active fair trade program? Yes ☐ No ☐

Comments, if any: _____

8. What do you consider would be the probable resulting effects on this establishment should the fair trade laws be repealed?

CONTINUATION, if necessary

Item No.	DESCRIPTION

REMARKS:

Signature of official completing form:	Title:	Date:

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Appendix D

Categories of Fair-Trade Products Carried by Retailers (In Order of Relative Frequency)

1. Cosmetics.
2. Electrical appliances.
3. Drugs and pharmaceuticals.
4. Automobile accessories.
5. Hardware.
6. Jewelry (including watches, pens etc.).
7. Food products.
8. Cameras and photographic supplies.
9. Sporting goods.
10. Clothing.
11. Alcoholic beverages.
12. Books.
13. Chemicals.
14. Housewares.

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84TH CONGRESS } SENATE { REPORT
2d Session } { No. 2820

PROVIDING AN INVESTIGATION OF KIDNAPING BY THE FEDERAL BUREAU OF INVESTIGATION WITHIN 24 HOURS AFTER THE OCCURRENCE

JULY 27, 1956.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 800]

The Committee on the Judiciary, to which was referred the bill (H. R. 800) to amend section 1201 of title 18 of the United States Code to authorize the Federal Bureau of Investigation to initiate investigations of any kidnaping in which the victim has not been released within 24 hours after his seizure, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to amend subsection (b) of section 1201 of title 18, United States Code, in order to provide that the Federal Bureau of Investigation may officially enter the investigation of a violation of section 1201 (a) of title 18, United States Code—the kidnaping statute—within 24 hours after the victim shall have been kidnaped, instead of 7 days as provided under existing law.

GENERAL STATEMENT

Section 1201 (a) of title 18, United States Code, provides that anyone who knowingly transports in interstate or foreign commerce a person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward, or otherwise, commits the crime of kidnaping. An exception is made, however, in the case of a minor taken by a parent thereof. The statute provides punishment by death if the subject of the kidnaping has not been liberated unharmed and if such a verdict is recommended by the jury. Otherwise the punishment is imprisonment for any term of years or for life, if the death penalty is not imposed.

90005°—57 S. Rept., 84-2, vol. 5——96

Subsection (b) presently provides that if the victim has not been released within 7 days after he shall have been kidnaped, a rebuttable presumption is created that such person has been transported in interstate or foreign commerce. Subsection (c) defines the crime of conspiracy to violate this section.

The substantive crime of kidnaping was enacted into law by the act of June 22, 1932 (47 Stat. 327). That act did not provide for the creation of the rebuttable presumption, predicated upon the failure to release the victim within 7 days after the occurrence of the crime, that the victim had been transported in interstate or foreign commerce. Federal jurisdiction in that act was predicated upon the actual transportation of the victim in either interstate or foreign commerce.

The act of May 18, 1934, amended the existing law by creating a rebuttable presumption that the failure to release the victim within 7 days after he shall have been kidnaped, in violation of section 1201, that such person had been transported in interstate or foreign commerce. The effect of that amendment was to permit the Federal Bureau of Investigation to initiate officially an investigation of a violation of section 1201, of title 18, United States Code, 7 days after the date the crime was committed. The jurisdiction of the Federal Government arose out of the rebuttable presumption that the kidnaped person had been transported in interstate or foreign commerce because he had not been released within 7 days after being kidnaped.

That presumption, of course, was not conclusive; it was a presumption of fact which could be rebutted by credible evidence. In addition, the amendment had for its purpose the clearing up of borderline cases justifying Federal investigation in most of such cases, and assured the validity of Federal prosecutions in which prosecution might be questionable under the then present form of the statute. Moreover, the legality of such a presumption was clearly within the case law established by the United States Supreme Court.

Since the enactment of the act of May 18, 1934, the record of the Federal Bureau of Investigation in the apprehension and conviction of persons violating section 1201 of title 18 of the United States Code has been outstanding. The Committee on the Judiciary is well acquainted with the remarkable and efficient technique developed by the Federal Bureau of Investigation in the detection, apprehension, and the conviction of perpetrators of the heinous crime of kidnaping. The committee feels that it is not necessary to dwell upon the ability of the Federal Bureau of Investigation along these lines, since the record is so well known and speaks for itself.

However, during the past few years kidnapings have occurred which have unfortunately resulted in the deaths of innocent victims. Without criticizing any law-enforcement agency, it is the opinion of the committee that the efficient work of the Federal Bureau of Investigation, had it been able to initiate its official investigations prior to the statutory period of 7 days after the date of occurrence, might well have prevented the tragic deaths of the victims. The mere apprehension and conviction of these criminals is one aspect of the problem. The other is to preserve the life of the victim. Another factor to be considered which, in the opinion of the committee, strengthens the need for the proposed bill, is the recognition of the worldwide reputation of the Federal Bureau of Investigation for the apprehension and conviction of kidnapers. The fact that a potential kidnaper would

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be cognizant of the fact that the Federal Bureau of Investigation would take up his trail within 24 hours after the commission of the crime should prove to be a deterrent in the minds of those criminals.

There appears to be no valid reason why the Federal Bureau of Investigation should be compelled to stand by for 7 days after the date of the occurrence of the crime before initiating an official investigation. Here it should be noted that when subsection (b) of the present statute was enacted into law the Senate version of that act provided that the Federal Bureau of Investigation should initiate its investigation within a period of 3 days after the kidnaping. The report which accompanied the bill as it was reported by the House does not explain why the change was made from 3 to 7 days. It can only be surmised that the 7-day period was a compromise.

In view of the above reasons, your committee recommends the favorable enactment of the bill, H. R. 800.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

Chapter 55.—KIDNAPING

Sec.
1201. Transportation.
1202. Ransom money.

§ 1201. Transportation.

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

(b) The failure to release the victim within [seven days] *twenty-four hours* after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a).

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84TH CONGRESS } SENATE { REPORT
2d Session } { No. 2824

CREATING AN ADDITIONAL POSITION OF ASSISTANT DIRECTOR IN THE BUREAU OF THE BUDGET

JULY 27, 1956.—Ordered to be printed

Mr. JOHNSTON of South Carolina, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To accompany S. J. Res. 199]

The Committee on Post Office and Civil Service, to whom was referred the bill (S. J. Res. 199) to authorize an additional position of Assistant Director in the Bureau of the Budget, having considered the same, report favorably thereon and recommend that the bill do pass.

STATEMENT

The purpose of this proposed legislation is to provide the Director of the Bureau of the Budget with one additional Assistant Director. This position is commensurate to the assigned responsible duties now existing by virtue of recommendation and approval of the President. These duties and responsibilities require the surveillance of resources and civil works, health, education, welfare, labor, and veterans' affairs.

Congress has provided for the expansion of the accounting function in the Bureau and has appropriated funds to permit immediate and rapid expansion of the staff. The program to be undertaken has full support of the Treasury Department, the General Accounting Office and is already underway.

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84TH CONGRESS } SENATE { REPORT
2d Session } { No. 2825

PROVIDING FOR RECONVEYANCE OF CERTAIN LANDS IN THE BENBROOK RESERVOIR PROJECT, TEXAS, TO FORMER OWNERS OF SUCH LANDS WHERE SUCH LANDS ARE NOT REQUIRED FOR PUBLIC PURPOSES

JULY 27, 1956.—Ordered to be printed

Mr. CHAVEZ, from the Committee on Public Works, submitted the following

REPORT

[To accompany H. R. 12006]

The Committee on Public Works, to whom was referred the bill (H. R. 12006) to provide for the reconveyance of certain lands in the Benbrook Reservoir project, Texas, to former owners of such lands where such lands are not required for public purposes, including public recreational use, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments are indicated in the bill as reported by linetype and italics.

The purpose of H. R. 12006 is to authorize the Secretary of the Army to reconvey certain lands acquired for reservoir projects located in the State of Texas to the former owners thereof where such lands are not required for public purposes, subject to certain exceptions, restrictions, and reservations necessary in the public interest.

GENERAL STATEMENT

The Department of the Army has acquired and is in the act of acquiring the necessary lands for the Belton Reservoir on the Leon River, a tributary of the Brazos River, Tex., and for the Benbrook, Garza-Little Elm (Lewisville) and Grapevine Reservoirs, on the Trinity River in Texas. The Belton Reservoir was authorized by the Flood Control Act of 1946, and the other three reservoirs were authorized by the River and Harbor Act of 1945.

The acquisition of a portion of these lands through purchase transactions has been completed and, in addition, title to a large portion has been vested in the United States through condemnation proceedings, some of which have not progressed to the determination of just compensation and the entry of final judgment.

During the early stages of construction on some of these projects it was the policy of the Corps of Engineers to acquire fee simple title to the necessary land. This policy was changed about 2 years ago to provide for acquisition of title to lands permanently flooded and those below elevations frequently flooded, with purchase of flowage easement over the reservoir lands less frequently or rarely inundated. Prior to this change in land acquisition policy, a considerable amount of land had been acquired in fee simple.

Enactment of H. R. 12006, as amended, would provide the Secretary of the Army with authority to make adjustments, through reconveyance to former owners of lands or interests therein, which the current development status of the project indicates may be feasible. The proper exercise of this authority will serve to bring about the desired adjustments in a manner fair and reasonable, both to the owners of lands now being acquired, and to owners of lands that have been acquired heretofore, and at the same time preserve the objectives of the Federal Property and Administrative Services Act of 1949, as amended, and the policies and procedures employed in its administration.

The committee has amended the bill to protect the Federal Government, the former landowners, and the present landowners. The inclusion of "public recreational use" in the public purposes for which such land is not required has been eliminated, to give broader meaning to such use.

The committee is aware that several cities in Texas have contributed funds toward the construction of these reservoirs as compensation for storage space therein for water supply purposes. It does not believe, and it is not intended, that this legislation will decrease the water supply storage in any of these reservoirs. It is noted that the reconveyance of land under this bill is permissive, rather than mandatory, and will terminate within 3 years after date of its enactment. There are also certain date limitations in the Senate amendment relative to the Grapevine and Garza-Little Elm Reservoirs, which prior to such dates, no reconveyance can be made.

The committee has been informed that a study of the storage capacities in these reservoirs is now being studied by the Texas Water Board, and it is probable that no reconveyances will be made until completion of that study. Definite determination can then be made of the storage capacities needed and the pool elevations of the same.

The committee was informed that the Department of the Army has no objection to enactment of this legislation.

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